STATEMENT OF THE CASE

In October of 2009, a trial was conducted in an Eastern District of Michigan courthouse under a Title 18, section 3231 jurisdictional assertion based on allegations of the United States Department of Justice. The charges were that in declaring his belief that no payments he received during various years qualify as the "wages" defined in tax law, Defendant Peter Hendrickson was guilty of willfully subscribing materially false tax returns under the provisions of 26 U.S.C. §7206(1).

Throughout the trial, not a single witness testified concerning any statutory element of the offense. For example, no witness testified that Hendrickson had received "wages," or about "wages" in any manner whatever. The only payment-related testimony of any kind was merely that Hendrickson had been paid for his work, a point never disputed. No effort was made to distinguish those payments as within the statutory definitions of "wages," and they were never characterized as "wages" by any testifying witness.

However, prosecutors were allowed to publish documents which the judge explicitly instructed the jury to take as evidence that government experts had concluded that Hendrickson's earnings were "wages." The rationale for this untestable, inculpatory judicial instruction was that Hendrickson, being aware of these alleged "official views," should have been persuaded that his own conclusions were wrong, and his tax-form testimony of continued belief to the contrary can therefore be taken as "willful."

At the mid-trial colloquy, the judge informed Hendrickson that he would not be allowed to present expert witnesses. In testifying on his own behalf, Hendrickson explained to the jury that his conclusions that he has not received "wages" is based on specific statutory definitions distinguishing such payments from others which do not qualify. No rebuttal testimony was offered disputing either his reliance on the statutes or that they do, in fact, distinguish between payments.

Nonetheless, when the jury asked to see the specified statutory language, the judge denied the request. Then, for deliberations, the judge instructed the jury with prosecutor-written substitutes for the actual statutes – substitutes which declare that there ARE no definitional distinctions, and ALL payments for services to any worker anywhere and under any circumstances are "wages." These substitutes served to impeach Hendrickson's testimony, direct a conviction on the "actual receipt of "wages"" element and support the "willfulness" accusation – all without a single witness taking the stand on behalf of any of these issues, having to make statements under oath, and being available for cross-examination.

Just as in the case of the "wages" element, no testimony was given throughout the trial purporting to establish Hendrickson's qualification as a statutorily-defined "person" relevant to the charges. The judge had denied a pre-trial challenge on this point with the assertion that Hendrickson automatically qualifies, and prosecutors made no effort to prove this element.

Similarly, no evidence was offered concerning "materiality" or anything related thereto. The judge denied Hendrickson's mid- and post-trial motion for acquittal on this element on the grounds that "materiality" was "inferred."

After denying Mr. Hendrickson's request for oral arguments, all of the above was upheld by the appellate court. The court said "materiality" was inherent and needn't be proven directly, in direct conflict with rulings of this Court (and with the appellate court's own deep body of

precedents). Nothing at all was said in answer to the appeal on the statutory "person" issue. The appellate court misstates and fails to actually address the appeal arguments on the elements of "wages," "willfulness," and issues related to the Confrontation Clause.

REASONS WHY THIS PETITION SHOULD BE GRANTED

I. THE APPELLATE DECISION UNDERMINES THIS COURT'S SOUND DOCTRINES ON THE RIGHT TO CONFRONT AND THE PROPER MANNER BY WHICH "WILLFULNESS" IS DETERMINED, AND AFFIRMS A DIRECTED CONVICTION ON "WILLFULNESS"

A. Untestable Documents Declared To Be Inculpatory Expert Conclusions Were Presented To The Jury

This Court has clearly held that documents unsupported by witnesses available for challenge cannot be presented as evidence for any inculpatory assertion on, or by way of, the documents themselves without violating a defendant's right to confront secured in the Sixth Amendment. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), for example, a conviction for distributing cocaine was overturned by this Court because a document was submitted to the jury as evidence of an official conclusion that the defendant was guilty of an element of the offense charged (possessing cocaine) without the person responsible for that alleged conclusion being made available to be questioned by the defendant and possibly proven wrong, dishonest, misrepresented or misunderstood.

In this case, the trial court allowed the government to publish to the jury 739 pages of witnessless documents over Mr. Hendrickson's objections. These documents, amongst which are sworn "declarations" by purported government expert witnesses, were published for the express purpose of serving as evidence 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." This was declared twice to the jury by the trial judge (Trial Transcript ("TR") at 267 and 437; App. Brief pp. 12 and 13; App. Supp. Brief pp. 30).

Hendrickson declared on his tax forms his belief that he had received $0 in code-defined "wages." Whether this is correct or not is an element of the offense charged. Therefore, this case involves an exact duplicate of the rights violation in *Melendez-Diaz*, simply writ larger (and with farther-reaching aspects, as will be discussed below). In this case, a massive number of documents were presented to the jury as evidence of official conclusions that Hendrickson was guilty of an element of the offense (receiving what constituted "wages" while having reported receiving none), with those responsible for this alleged "view" not made available to be questioned and proven wrong, dishonest, misrepresented or misunderstood.

A nominal "curative" instruction was voiced at the same time as the prejudicial, untestable judicial assertion concerning these documents quoted earlier: "The evidence is not offered for the purpose of establishing the fact that Mr. Hendrickson received wages from Personnel Management, Inc." So, even though the documents were meant to be taken as evidence that government experts had concluded Hendrickson's earnings were "wages," they were not meant to be taken as evidence that Hendrickson's earnings really were "wages." Whether this "cure" rises above a mere fig-leaf in any relevant way is for this Court to decide, but it has no bearing on Mr. Hendrickson's appeal, which does not argue that the documents were expressly presented as evidence of his receipt of "wages."

B. The Appellate Panel Misstates The Record And The Appeal Issue And Improperly Affirms This Confrontation-Right Violation

The appellate panel denied Hendrickson's appeal over this issue, reasoning that, "...the documents, even if testimonial, were admissible because they were used only to show that Mr. Hendrickson was on notice that his interpretation of tax law concerning wages had been rejected and that his refusal to comply with the law was therefore willful, not to show that Hendrickson's earnings constituted taxable wages."

This language misstates both the record and Hendrickson's appeal on this issue. The documents were ***not*** used ***only*** to show what the panel says – as indicated above, they were used to instruct the jury that implicit specialists and experts at a government agency were of the view that Mr. Hendrickson was guilty of an element of the offense charged. Further, Hendrickson did not argue that his confrontation right was violated because the documents "show that [his] earnings constituted taxable wages."

What Hendrickson actually does argue is that his rights were violated because the documents were explicitly used to assert that "the IRS was of the view" that his earnings constituted "wages." Hendrickson argues that the truth of this assertion is unproven, and its prejudicial effect on a jury that will presume the alleged holders of this official "view" to have the appropriate expertise, relevant knowledge of the facts and honesty needed to express meaningful conclusions about his earnings is unmistakable.

C. The Instruction And Rationale By Which The Untestable, Declaredly Inculpatory Documents Were Admitted Work To Direct A Conviction On "Willfulness"

Mr. Hendrickson also argues that even the declared intent behind presenting these documents is enormously prejudicial and works a harm. The declared purpose for presenting these documents was as proof that Hendrickson was "willful" because though told of "official views" that allegedly conflict with his own, he continued to act on his own beliefs about the law. But external authority, whether honestly represented or not, is irrelevant to "willfulness," which is entirely a subjective matter, as has been clearly held by this Court in *Cheek v. United States*, 498 U.S. 192 (1991).

The instruction to the jury implying that Hendrickson is proven "willful" by evidence that he holds to his own conclusions even in the face of what are alleged to be differing views of IRS officials clearly amounts to an assault on Mr. Hendrickson's right to be properly judged on the element of "willfulness." It suggests to the jury that it should assess the "willfulness" of Hendrickson's actions by measuring his professed views against these alleged (and here, judicially-endorsed) "official views" (as the instruction clearly says he himself should have done), rather than on the basis of what he himself knows and believes about the law. The instruction simultaneously implies that Hendrickson's view is objectively unreasonable, and destroys the possibility of a proper determination of "willfulness" by the jury.

> Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it.

Cheek supra, 498 U.S. at 203.

D. The Document Admission And Instruction Generated A Constructive Presumption Of Guilt

The characterization and judicial endorsement of the notion that Mr. Hendrickson must have (and should have) been persuaded that his own view is incorrect by exposure to these alleged contrary "official views" constitutes a judicial declaration that Hendrickson's view **is** incorrect, and that his continuing to act on it **was** "willful." It thus generates in the jury a conclusive presumption of guilt. At the least, the possibility of such a generation clearly exists; either way, the resulting conviction is fatally tainted.

As this Court points out in *Connecticut v. Johnson*, 460 U.S. 73, 84-85 (1983), discussing *Sandstrom* while upholding a reversal of conviction by a lower court:

> [A] conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue.... The jury thus would have failed to consider whether there was any evidence tending to cast doubt on this element of the crime... Because a conclusive presumption eases the jury's task, "there is no reason to believe the jury would have deliberatively undertaken the more difficult task" of evaluating the evidence of intent. Sandstrom, 442 U.S., at 526, n. 13.... The trial court's instruction removed this defense from the jury and directed it to find that the State had proved the intent element of the offenses.

Thus, there is a second "confrontation" implication by this witnessless submission of documents declared to be evidence of government expert conclusions that Mr. Hendrickson's earnings were "wages." Not only does it instruct the jury that government experts declare him guilty of one offense element (the alleged incorrectness of his reports), but it serves to guide the jury to improperly conclude guilt regarding another element of the offense.

E. The Sixth Circuit Has Upheld A Criminal Conviction Based On The Testimony Of Witnesses Improperly Shielded From Confrontation

If allowed at all, the "official views" allegedly represented by the faceless documents admitted against Mr. Hendrickson should have been asserted by those purportedly holding them – on the stand and under oath. Mr. Hendrickson should have had the opportunity to prove that no one at the IRS actually **is** of this "view," or that if they are, they lack the qualifications and/or accurate knowledge of relevant facts on which to legitimately base such a view – and that Hendrickson has always had good reason to know these things.

Only by a fair opportunity to confront and test could Hendrickson defend himself against the prejudicial assertion that government experts had knowledgeably "rejected" his interpretation of the law, and believe him guilty of the offense element of submitting incorrect "wage" reports. Only by a fair opportunity to confront and test could Mr. Hendrickson prevent the jury's proper perspective on "willfulness" from being undermined by the admission of these documents.

In short, Mr. Hendrickson's appeal concerning this issue involves his simple and straightforward right secured by the Sixth Amendment to defend himself against inculpatory assertions which his jury was expressly instructed to take as proven by faceless documents. The multi-dimensional pernicious effects of violating that right in this case offers a textbook example of why confrontation is so important to a fair trial.

The appellate decision on the admission of untestable evidence against Mr. Hendrickson affords not a single word of consideration to its comprehensively prejudicial effects in his trial. The

lower court simply suggests that whatever the government or trial court declares to be the purpose for submitting untestable inculpatory evidence should be the sole concern of the reviewing tribunal.

Even beyond the fact that in this case the declared purpose of the submission is itself plainly prejudicial, this reasoning of the appellate court completely undermines this Court's position prescribed in *Melendez-Diaz*. Indeed, this Court begins its analysis in that ruling by explicitly and unequivocally rejecting this reasoning. As concisely summarized in the syllabus, "[The] claim that the analysts are not subject to confrontation because they are not 'accusatory' witnesses finds no support in the Sixth Amendment's text or in this Court's case law." In discussion, the Court emphasizes that "The Sixth Amendment guarantees a defendant the right 'to be confronted with the witnesses *against him'*" and that this means *any* witness used for *any* prosecutorial purpose. "The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution MUST produce the former; the defendant may call the latter... [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Melendez-Diaz, supra* at 129 S.Ct. 2534.

The appellate decision on the Confrontation Clause issue here is in sharp conflict with this Court's well-settled doctrine on an explicit, critically important Constitutionally-secured right. It should be reversed.

II. THE APPELLATE DECISION IN THIS CASE AFFIRMS A DANGEROUS MECHANISM FOR PRODUCING DIRECTED CONVICTIONS AND LETS STAND A MANIFEST INJUSTICE

A. Proof Of The Offense Elements Required Specific Fact Evidence

In 1995, in *United States v. Gaudin*, 515 U.S. 506 (1995), this Court unanimously affirmed that in order for a prosecution to properly comport with the due process and jury trial provisions of the Fifth and Sixth Amendments, every element of an offense must be determined by the jury – after consideration of actual evidence – rather than declared by the judge. In his concurring opinion, Chief Justice Rehnquist quotes the Court's 1993 ruling in *Sullivan v. Louisiana*, 508 U.S. 275: "The prosecution bears the burden of proving all ... of the facts necessary to establish each of th[e] elements."

The language chosen by Chief Justice Rehnquist is instructive, making the important point that "an element" is by nature a specification which identifies the facts distinguishing actions and things comprising an alleged offense from actions and things which do not. It is for this reason that every element must go to the jury for its determination. The jury is the finder of fact in a criminal trial, and every element of an offense rests on distinguishable facts.

The issue of "materiality" specifically involved in the *Gaudin* case provides a fine example of this principle. As observed in the ruling, only certain statements are "material." How a statement particularly affects an administrative process distinguishes it as "material" from among others which may be made in the very same context but which, upon knowledgeable examination of details and circumstances, lack the requisite character to qualify. Likewise, only one kind of white powder is "cocaine"; only a blow under certain circumstances is "assault"; only certain persons fit a statutory definition of "person"; and only certain payments to workers qualify as statutorily-defined "wages."

The distinctions – the "facts necessary to establish" the elements – are everything, and as the *Gaudin* court says, they must be proven to the jury. It is not for the judge to decide what distinctions do or do not apply, or need to be considered by the jury, since to control the distinctions considered by the jury is to direct its determination on the related element.

In this case, the government bore the burden of proving at least three purely fact-based elements:

1. that Mr. Hendrickson actually received payments of the kind required to be reported as "wages" on tax forms;

2. that his declarations of belief as to his actual "wage" receipts were "material" to a specified process and purpose; and

3. that he was in the statutorily-defined class of persons subject to the charge, and under an attendant legal duty in regard to reports of what he believed to be the amount of "wages" he received.

Further, if these other things were actually proven true, the government was required to prove that Hendrickson made his declarations in deliberate violation of what he believed to be his legal duty – that is, "willfully."

B. The Jury Was Prevented From Making Fact Determinations, And Was Directed To Convict On Both The "Wages" And "Willfulness" Elements

The indictment alleges that Hendrickson received "wages" and improperly failed to report them (RE 3). The "wages" that qualify for this allegation are defined at 26 U.S.C. §3121(a) and §3401(a). (See 26 U.S.C. §6051(a).)

Whether Hendrickson received "wages" is a technical matter, and if true, nothing is simpler than putting a witness on the stand to say so – indeed, the government ***must*** do this, in keeping with this Court's holding in *Gaudin*. And yet, this is just what ***did not*** get done in this case. Instead, not only did the government carefully avoid the subject even when examining the creators of the W-2s from which the "wage" allegations originate, but the court refused to let the jury see the actual statutory definitions of "wages," even in the face of its direct request (Appellant's Supp Brief, p. 26; TR at 657-658).

More, over Mr. Hendrickson's objection and demand that jurors see the actual statutory definitions as written by Congress, and on the basis of which he had acted (Appellants Supp. Brief, pp. 23, 26; TR at 807), the court instructed the jury with prosecutor-written substitutes for those definitions – which, being substitutes, are necessarily different from the actual statutory language itself, and thus inevitably inaccurate. These substitutes, in fact, conceal all distinctions in the law and instruct the jury that ***all*** payments to ***all*** workers qualify as "wages" – something that is simply not true.

1. Some payments for services rendered are "wages"; some are not

"Wages" are defined differently in §3121(a) and §3401(a), but both definitions encompass only a distinguished subclass of the greater class of ***all*** payments for services performed as a worker. The distinctions are invoked by hinging the meaning of "wages" on other defined terms.

In §3121(a), "[T]he term "wages" means all remuneration for employment [as defined at §3121(b)]..." (26 U.S.C. §3121(a)). Because §3121(b) "employment" is specially-defined, it is axiomatic that it is different from commonly-defined employment *Meese v. Keene*, 481 U.S. 465 (1987). Since commonly-defined employment is all-inclusive of any work-for-pay, statutorily-defined "employ-ment" cannot be. Instead, statutorily-defined "employment" is necessarily limited to a distinguished subclass of work-for-pay (or different from commonly-defined employment altogether).

Further, even within the subclass, numerous exceptions are carved out. The Treasury Department acknowledges this fact:

> 26 C.F.R. sec. 31.3121(b)-4 Employment; excepted services in general
>
> (a) Services performed by an employee for an employer <u>do not constitute employment for purposes of the taxes</u> if they are specifically excepted from employment under any of the numbered paragraphs of section 3121(b)....
>
> (b)...
> Example. ... <u>While no tax liability is incurred</u> with respect to A's remuneration for services performed in the employ of B (the services being excepted from employment)...

(Emphasis added.)

In light of these facts, it is clear that the "employment" that qualifies some payments as §3121(a) "wages" is not all-inclusive of all work, but is a special subclass distinguished from commonly-defined employment. Therefore, while some payments for services qualify as §3121(a) "wages," some do not.

Similarly, in §3401(a), "[T]he term "wages" means all remuneration ... for services performed by an employee [as defined at §3401(c)]..." 26 U.S.C. §3401(a). Because "employee" is specially defined for purposes of the statute, it is axiomatic that it is a distinguished subclass of the all-inclusive term 'employee' as commonly defined (or has a different meaning altogether).

The statutory "employee" definition makes this distinction directly, by specifically enumerating federal and federally-connected employees as being within its scope:

> For purposes of this chapter, the term "employee" includes an 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). Specifically listing federal and federally-connected employees would be a pointless exercise if the statutory term being defined had (or paralleled, or encompassed) the common meaning of 'employee,' by which they would be covered without needing to be specifically mentioned. At the same time, the exclusion from the enumerated list of any other category of employee indicates that the statutory term is not meant to encompass those lacking the federal or federally-connected qualification. See *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934) fn1; *Meese v. Keene, supra; Mobley v. CIR*, 532 F.3d 491 (6th Cir. 2008).

Further, within the statutory scheme numerous exceptions are carved out, excluding even payments to those actually within the subclass of "3401(c) employees" from qualifying as "wages":

26 C.F.R. 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).

26 C.F.R. 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)**.

(Emphasis added.)

Clearly, not all workers are "employees," and clearly not all payments for services performed – not even all payments to those who ARE statutory "employees" – are §3401(a) "wages." Just as with §3121(a) "wages," some payments for services performed qualify as §3401(a) "wages"; some do not.

2. No evidence of "wage" payments was introduced, but the trial court falsely instructed the jury that all payments are "wages"

When the time came for deliberations, the jury had seen **no** evidence distinguishing any payments to Mr. Hendrickson into the "wages" category, nor anything even purporting to be such evidence. A number of documents on which Hendrickson's earnings are simply called "wages" without explanation had been presented as evidence, but the creators had never taken the stand.

The W-2s upon which all these "wage" allegations are based were put before the jury as evidence, but without supporting testimony. Their creators did testify for the government, to the effect that they considered Hendrickson to have been an employee – but admitted that they only meant "commonly-defined employee," and were unaware of any statutory definitions. No testimony was sought or offered as to amounts paid to Mr. Hendrickson under any label, and the term "wages" was carefully avoided by prosecutors during the examination of these witnesses. In short, after all evidence had been presented, the jury had no legitimate reason whatever for concluding that Mr. Hendrickson had received "wages."

However, the jury was prevented from considering the government's failure to produce evidence distinguishing payments to Hendrickson into the "wages" category. The trial court denied the jury the actual statutory language defining "wages" by which the necessity of such distinguishing fact evidence is revealed, even despite its request to see that language. Worse, the court explicitly instructed contrary to the statutes, telling the jury that all payments are "wages" using the following prosecution-written "substitutes" for the statutes, complete with section citations:

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 a 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)

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)

Whatever may be deemed accomplished by the use of the unexplained phrase "legal relationship of employer-employee," or other nuance by which these instructions might somehow pass some rigid test of technical accuracy, they unmistakably suggest that all payments to any worker are "wages." In so doing, they critically differ from the actual statutes as written by Congress and as read by Mr. Hendrickson, and give the misleading impression that even having proven nothing but that Hendrickson was paid for work, the government's "wages" evidence was sufficient.

The verdict issued makes clear that Hendrickson's jury was misled by these substitutes. Had the actual statutory language been the standard against which the government's evidence of "wage"-qualifying payments to Mr. Hendrickson was measured, no reasonable jury could have found it sufficient. That the meaningless evidence produced here was found sufficient was not a "finding of fact" error, but the result of an improper instruction which removed the actual fact-finding authority from the jury's hands.

3. The false instructions contradict Mr. Hendrickson's testimony, impeach his veracity, and support the "willfulness" accusation

In addition to essentially instructing a conviction on the "wages" element, the false definitions given by the trial court made impossible the jury's proper consideration of the basis for Mr. Hendrickson's conclusions about the meaning of "wages." On the contrary, they actually serve to instruct the jury that anyone who claimed to have studied the statutes, as Mr. Hendrickson did, could not have come to the conclusions he says he has, and his behavior could only have been "willful."

Further, though barred by the judge from presenting expert witnesses (Appellant's Supp. Brief, pp. 18-19; TR at 499-500), Hendrickson himself quoted the correct definition of "employee" at §3401(c) during his testimony. The language he presented was, of course, contrary to the language with which the jury was ultimately instructed. That substitute language thus not only perversely contradicted Hendrickson's accurate testimony concerning the content of the statute, but judicially impeached his veracity, as well.

All told then, by refusing to let the jury see the actual statutory specifications by which it must judge the sufficiency of the government's evidence, and requiring deliberations based on inaccurate substitutes instead, the trial court:

- instructed the jury that Hendrickson had received "wages" and his tax form declarations were therefore false;

- instructed the jury that if Hendrickson can read, his actions were "willful" (because it must presume that he will have acted based on the same definitional language the jury had been given); and

- made Hendrickson appear perjurious in his recital of the language of §3401(c) and discussion of the statutory definitions in his testimony (his accuracy about all of which was perversely contradicted by the language of the substitutes).

4. The appellate court fails to address the appeal on this issue

The appellate court disposes of Mr. Hendrickson's appeal on this issue with nothing but a one-sentence misrepresentation of the argument and record:

> The district court properly defined both "wages" and "employee," rejecting Hendrickson's claim that the term "employee" includes only the persons listed in 26 U.S.C. 3401(c).

What the appellate court means by "properly defined" in this language is unclear, because this response is entirely off-key and off-point. For one thing, Hendrickson never claimed or argued that "employee" includes "only the persons listed in 3401(c)" – he explicitly argues that the term's scope is only limited to the **class exemplified** by the persons listed. For example, "The term "employee" is defined ... as a particular class of workers, illustrated by the following list of specific members:..." (Appellant's Supp. Brief, p. 14). Responding to a question in trial on this point, Hendrickson says, "Not exclusively to those specific listed people, but to that class of persons, yes." (Appellant's Brief, p. 15; TR at 628.)

Much more importantly, Hendrickson does not argue that the meaning of "employee" is fundamentally relevant to, or in any way dispositive of, this issue of the appeal. Even the actual meaning of "wages" is not really central to the appeal issue.

What the appeal concerns are the simple facts that not all payments constitute "wages," and that, for the government to prove its allegations that Mr. Hendrickson had received what **does** constitute "wages," it must distinguish payments he received from being in the **does not** category. The statutory definitions are discussed solely to demonstrate that "wages" is a term of limited scope.

Here, the appellate court merely observes the undisputed fact that the enumerated list in the "employee" definition is not exclusive. Entirely unaddressed is the real issue of the appeal and what really matters about the definitions: the undisputed fact that the enumerated list is also not all-inclusive; the effect this has on the meaning of "wages"; and the effect *that* has on the government's evidentiary burden.

By failing to address what actually did happen, and what Mr. Hendrickson actually does argue, the appellate court endorses the trial court having taken control over what came out of Mr. Hendrickson's jury room by abusing its control over what went into that room. This decision is in stark conflict with precedents of this Court regarding the rights guaranteed by the Fifth and Sixth Amendments so endless and so fundamental as to make any citation of cases disrespectful.

C. The Jury Was Prevented From Making Fact Determinations On "Materiality" And Was Directed To Convict On That Element

1. The government's obligation to produce explicit evidence of "materiality" is clear and unambiguous

In *United States v. Gaudin,* the specific focus of the Court is the treatment of "materiality" as inherent or inferred, and determinable purely as a matter of law. The *Gaudin* decision recognizes "materiality" as " a mixed question of law and fact" which must be established by testable evidence, and that a failure to present such evidence "raises a question of 'law' that warrants dismissal" (*Gaudin* at 517).

The *Gaudin* Court recognizes that whether a tax form declaration concerns a "material matter" hinges on the role that declaration plays in the mechanics of a complex administrative process of tax liability determination about which nothing can be assumed – even what might seem self-evident on its face. This is especially true in a case like this one in which Mr. Hendrickson's declarations are simply expressions of his own legal conclusions being presented to a tax agency already in possession of W-2s making contrary assertions. The government – purportedly in good faith – has deemed those W-2 assertions so unassailably dispositive of Hendrickson's liability all on their own as to propose that Hendrickson himself cannot possibly believe otherwise. Plainly, whatever role or significance Mr. Hendrickson's declarations have in this process is actually far from obvious; and as this Court puts it in *Kungys v. United States*, 485 U.S. 759 (1988), the evidence needed to resolve such questions must be "clear, unequivocal and convincing" rather than merely asserted, inferred or implied.

The *Gaudin* doctrine embodies the fundamental principle that the government must forthrightly prove every element of a charged offense, to an informed jury and with testable evidence purporting to prove that element. In *Sandstrom v. Montana,* 442 U.S. 510 (1979), citing to *In re Winship*, 397 U.S. 358, 364 (1970), the Court further says that element evidence must be independent – proof of one element cannot be deemed to make direct proof of another unnecessary, by inherence or inference.

2. No evidence of "materiality" was offered – the term was never uttered nor alluded to, and no witness appeared who was capable of testifying on the issue

What *Sandstrom* and *Winship* condemn and *Gaudin* and *Kungys* declare to be inadequate are precisely what happened in this case. "Materiality" is an element of the offense charged, defined as follows in the jury instructions on this element (here presented in their entirety): "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." However, no evidence of falseness was presented; further, the term "material" (or any variation thereof) was never uttered by any government witness. No effort was made to prove "materiality"; nor was the subject of tax liability raised or addressed in any fashion whatever. The trial court denied Mr. Hendrickson's mid- and post-trial motions for a directed acquittal, despite this complete lack of evidence, by declaring "materiality" to be "inferred."

Whatever the trial court's view of the matter, the jury in this trial was incapable of concluding "materiality" by inference from evidence – not only for lack of evidence, but also for lack of instruction. If the jury "inferred" "materiality," it can only have been from the trial court's indication that it was expected to do so.

Another decision of this Court provides a worthwhile perspective to make clear the invalidity of the jury's declared verdict on "materiality." In *California v. Roy*, 519 U.S. 2, 7 (1996), holding that a formal verdict must be issued on every element of an offense, Justices Scalia and Ginsburg observe in a concurring opinion that, "The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." Purely an issue of form, then, was deemed dispositive of the validity of the conviction.

Here we have a case in which a formal verdict was issued, but one which cannot be considered reliable. Even if "materiality" could be found by mere inference, the jury was uninstructed in such a doctrine, and therefore could not have made a deliberate determination on that basis. What the jury could have done, and manifestly did do, is assume that because the court let the case proceed to deliberation, the court itself deemed "materiality" somehow proven, and that was good enough. Here, then, the verdict error is not of mere form, but of solid substance.

Justices Scalia and Ginsburg go on to quote *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilt." In Hendrickson's case, the validity of the verdict rendered is completely implausible, and to deem it otherwise is purely speculative, at best. For the appellate court to uphold it is to make trial by jury an empty formality.

3. The appellate ruling is in direct conflict with this Court's rulings in *Gaudin, Sandstrom,* and *Melendez-Diaz*

In response to Hendrickson's direct appeal, and itself facing the fact that no evidence or instruction of any kind was offered to allow the jury to actually make a determination on the element, the appellate court followed the trial court's lead, ruling that "materiality" was implied. It's handling of the issue consists of nothing more than: ""[I]n a prosecution under sec. 7206(1), any failure to report income is material." *United States v. Tarwater*, 308 F.3d 494, 505 (6th Cir. 2002) (internal quotation marks omitted)."

This disposal of the issue completely overlooks the appeal argument that the jury's verdict cannot be deemed reasonable or valid in light of the lack of evidence and instruction. It also holds that no testable evidence is needed to prove "materiality," and a criminal defendant has no right to confront and impeach an accuser in regard to this element.

This reasoning is precisely what this Court says is unconstitutional in *Sandstrom* and *Melendez-Diaz*. It is precisely what this Court says is insufficient in *Gaudin*, in recognition that "materiality" arises only by an actual, demonstrable impact of the allegedly "material" thing on a process to which it is allegedly "material."

Without testimony from an appropriate IRS worker concerning whether and how someone's own conclusions about his own "wage" receipts are "essential to [the agency's] accurate determination of [his] tax liability" – particularly in light of the government's claim, as in this case, that the agency already has information by which accurate determinations can be made – neither the jury nor the judge is capable of determining whether any declaration, false or not, is actually of a "material matter." More, without that testimony, Mr. Hendrickson is denied any opportunity to confront the "materiality" allegation.

4. The appellate ruling actually misrepresents the authority it cites and is in conflict with its own circuit precedents

The appellate ruling on the "materiality" issue in this case is in clear conflict with this Court's *Sandstrom, Winship, Gaudin* and other rulings. What's more, it is in conflict with its own circuit precedents, and even with the *Tarwater* ruling the Sixth Circuit cites as its authority.

The quoted language from *Tarwater* is actually that of a pre-*Gaudin* case of the 9th Circuit – *United States v. Holland*, 880 F.2d 1091 (1989), the doctrine of which has long-since been repudiated by the 9th Circuit itself – see, for instance, *United States v. Uchimura*, 107 F.3d 1321 (1997). It appears in the *Tarwater* ruling only as a secondary citation in support of the *Tarwater* court's definition of "material" for purposes of that case (."...capable of influencing ... the ability of the IRS to audit or verify the accuracy of a return"), not as a standard of proof of "materiality."

The actual standard of proof invoked by the *Tarwater* court is the *Gaudin* standard, which the 6th Circuit adopted in at least 1997 and to which it has been faithful ever since – until now. As the *Tarwater* court explains its application of that standard (immediately after the *Holland* language cited in the denial of Mr. Hendrickson's appeal): "Here, materiality was established by [IRS Revenue Agent] Barton's testimony that Tarwater's failure to report sizeable amounts of income was capable of influencing the IRS on the audit of Tarwater's tax returns."

So, the government in the *Tarwater* case did not deem Tarwater's alleged "failure to report income" to be, in and of itself, proof of "materiality" by inference or any other contrivance. Nor did the *Tarwater* appeals court. Instead, all parties agree that "materiality" had to be proven by direct, confrontable evidence concerning the impact of Tarwater's reports on the process of the auditing of his returns. The government was required to attempt such proofs in Hendrickson's case, as well.

The denial of Mr. Hendrickson's appeal is wrong as a matter of justice, sanctioning a wide-ranging violation of his rights. It also creates a sharp conflict with this Court's rulings in *Sandstrom, Winship, Gaudin, Kungys*, and *Melendez-Diaz;* with the 9th Circuit in *Uchimura*; and with the 6th Circuit itself in *Tarwater*. The appellate decision addresses none of these conflicts, offers no analysis, explains nothing, and merely skirts all issues on this element with a misrepresentation of what is actually one of its own contrary precedents quoting another circuit's long-since overturned rulings.

D. The Jury Was Prevented From Making Determinations And Issued No Verdict On The Offense Element Of Statutory "Person"

1. Being a statutorily-defined "Person" is an element of the offense requiring proof and a verdict

The statute under which the charges were brought against Mr. Hendrickson (26 U.S.C. §7206(1)) criminalizes the "willful" action of "any person." Section 7206(1) is among offenses codified in Chapter 75 of Title 26, where is also found section 7343, "Definition of term 'person.'" Section 7343 specifies that "The term 'person' as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

Because "includes" is itself a special term by use of which an enumerated list in a definition becomes a distinguishing sampling of the specialized class embraced by the term defined, rather than an exhaustive enumeration, the term covers all members of the class even though not all are

necessarily enumerated. As this Court puts it in *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934), speaking explicitly of the construction of "includes" under the tax-law rule at 26 U.S.C. §7701(c): "[T]he verb "includes" imports a general class, some of whose particular instances are those specified in the definition." Also see *Saginaw Bay Pipeline Co. v. United States*, 338 F.3d 600 (6th Cir. 2003); *Brigham v. United States*, 160 F.3d 759 (1st Cir. 1998).

Thus, "includes" means "calculated indefiniteness" (in that it allows for an expansion that, while limited to a special class, is unlimited in expansionary potential within that class). Under this rule of construction, the "persons" to whom provisions of Chapter 75 apply are any member of the class of tax-related fiduciaries – that is, those under a duty to handle tax-compliance obligations on behalf of another party.

However, "includes" *does not* mean "also includes," as if the definition in which it appears thereby becomes an expansion of *another definition*. A statutory definition is the sole definition of a term, without resort, reference or subordination to any external or colloquial definition. "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465 (1987). The 6th Circuit put it this way: "[W]e are not at liberty to put our gloss on the definition that Congress provided by looking to the generally accepted meaning of the defined term." *Tenn. Prot. & Advocacy Inc. v. Wells*, 371 F.3d 342 (6th Cir. 2004). Also see *United States v. The Schooner Betsey and Charlotte*, 8 U.S. 443 (1808), *Montello Salt Co. v. Utah*, 221 U.S. 452 (1911) and *Mobley v. CIR*, 532 F.3d 491 (6th Cir. 2008).

In sum, "person" as used in Chapter 75 and thus the charged offense in this case is anyone in the class of fiduciaries under a duty to meet tax-related compliance obligations for another party – and no one else. Whether Mr. Hendrickson is such a §7343 "person" is plainly an element of the offense.

2. Mr. Hendrickson challenged the indictment and jurisdiction of the court due to his not being a relevant "person," but his challenge was denied and the "person" question never went to his jury

By pre-trial Motion, Mr. Hendrickson challenged the indictment for failing to allege him to be a "person" subject to the charged offense statute, and the jurisdiction of the court for the same reason (RE 29; 39). Five months after the filing of his Motion, the trial court issued a lengthy denial, reasoning that the term "person" as used in the chapter and offense statute should be construed as meaning literally "any person" (RE 70). The appellate decision let stand, and thus endorsed, this construction.

No explanation was attempted for the impermissible superfluity of §7343 which is the consequence of this reasoning (see *United States v. Menasche*, 348 U.S. 528 (1955)), or the logical inconsistency of applying "person" to non-enumerated parties when the legislature had seen fit to enumerate specific parties. This construction simply asserts that despite the provisions of section 7343 in the law, "person" for purposes of the offense statute is actually not a statutorily-defined term at all, but is the equivalent of the dictionary-defined word 'person,' applying to Mr. Hendrickson merely because he is a human being. (The trial court ascribed the dictionary-definition of the word 'person' to the "code-wide" definition of "person" at 26 U.S.C. §7701(a), and then held that the definition of "person" for Chapter 75 is merely supplemental to that all-inclusive definition, but again, without explanation disposing of the fallacies and contradictions thereby produced). (RE 70)

This reasoning is in conflict with the statutory specifications themselves and the many relevant rulings of this Court, all of which were extensively discussed in Hendrickson's Motion. Nonetheless, in the face of Mr. Hendrickson's challenge, jurisdiction was assumed despite no evidence being produced by the government to establish this threshold element. Further, Mr. Hendrickson's jury never made any determination on this element at all, since the trial court refused to acknowledge it and instruct the jury accordingly. In fact, as the judge admitted in colloquy prior to jury deliberations, he had prepared an instruction declaring Hendrickson to be a "person" for purposes of the charges, in case the issue had revealed itself in trial. Thus, the "person" element becomes another in which the jury was prevented from determining the sufficiency of government efforts to prove necessary facts.

3. The appellate decision completely fails to address this issue of the appeal

Mr. Hendrickson raises this issue on appeal (Appellant's Supp. Brief, p. 43), but the appellate decision fails to address it in any manner whatever.

By affirming Mr. Hendrickson's conviction despite the defects discussed above, the appellate court puts itself in conflict with this Court's well-settled doctrines concerning the rules of statutory construction (particularly that requiring great precision and clarity in construing tax-related statutes); see *Gould v. Gould*, 245 U.S. 151, 153 (1917). The appellate decision further generates conflict on the issues of judicial obligations in the face of jurisdictional defects, evidentiary insufficiencies and the failure of the jury to issue a verdict on an element of a charged offense (see *California v. Roy, supra*).

CONCLUSION

The questions this Petition asks about whether the conviction in this case was fairly achieved, and its affirmation by the appellate court proper, have actually all been long-since answered by this Court. This Court has emphatically and uncompromisingly held that the violations enumerated in Mr. Hendrickson's appeal strike at the very heart of due process and the rule of law.

In *Gaudin* and *Sandstrom*, this Court says that every element of an offense must be proven to the jury, which must make educated determinations of every facet of every element. None can be declared or instructed by the judge. Surely this doctrine prohibits obscuring or putting out of the jury's consideration distinctions drawn in relevant statutes, whether by excusing the government from producing evidence on the point; instructing the jury with language other than the statutory language; or by causing the jury to believe that absent "officials" have already determined an element.

Yet the appellate decision needing review here upholds a conviction accomplished by doing all of these things. Here, the distinction between "wages" and "non-wages" was concealed, and ALL payments were considered to be "wages." Here, the distinction between "material" and "non-material" was ignored, and ALL declarations on a return were considered to be "material." Here, the distinction between "statutory person" and "non-statutory person" was denied, and ALL persons were considered to be "statutory persons."

In *Melendez-Diaz*, this Court plainly holds that no "expert" assertion bearing on an element of the offense can be presented against a defendant merely on paper, with no opportunity for

confrontation and impeachment. The appellate decision needing review here simply disregards that doctrine without explanation.

In *Cheek*, this Court plainly rules that "willfulness" is not to be determined by measuring a defendant's conclusions against some yardstick of "official views." The appellate decision needing review here upholds a conviction based on just such an improper measure, and worse, against an "official view" that is only *allegedly* contrary to the Defendant's, with no witness ever actually taking the stand under oath and disputing the Defendant's conclusions.

All in all, the appellate decision needing review here is erosive of wise and proper rules laid down by this Court over the years, each of which is critical to ensuring a fair trial. The decision upholds a creative assault on the concept of a fair trial, in which the statutes, rather than being constraints within which the prosecutorial apparatus operates, and to which it must conform, become weapons by which unconstrained government power is exercised.

It is hoped this Honorable Court will agree that the erosive appellate decision presented here for review, and the injustice to Mr. Hendrickson which it upholds, must be undone.