SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S NOVEMBER 3, 2009 MOTION FOR JUDGMENT OF ACQUITTAL AND/OR NEW TRIAL

Introduction

On November 3, 2009, Defendant Peter Hendrickson filed a Motion for Judgment of Acquittal or New Trial under Fed.R.Crim.P. 29(c) and 33(a), on various grounds, and sought and was granted leave to supplement this Motion after review of the trial transcript. Pursuant to this Motion and Order, Mr. Hendrickson respectfully submits the following brief supplementing his previously-filed Motion and Brief. An Index of Authorities, and related exhibits, are attached.

A. The Court Erred in Its Denial of Defendant's Pre-Trial Motion to Dismiss the Indictment Due to Mr. Hendrickson Not Being a "Person" Subject to the Charges, and in any event the Government Failed to Carry Its Burden of Proof as to this Element of the Offense in Trial

1. "Person" is a defined term as used in the charging statute's chapter of Title 26 USC.

> *§ 7343. Definition of term "person"*
> *The term "person" as used in this chapter [75] 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.*

Thus to be a "person" as so defined is an element of the offense, one the prosecution is under an affirmative obligation to prove. This is particularly the case since Mr. Hendrickson has rebutted any assertion, implication or presumption that he falls within the definition.

This burden cannot be met or mooted a) by any prosecution-serving assumption or construction that "person" as defined for the statute retains its dictionary definition or a definition provided in another statute, such as 26 USC §7701(a)(1), b) by treating such an alternative definition as controlling and merely supplemented by other things, or c) by reference to cases in which proper understanding of the term was not the subject of analysis, as in every case cited in response to Mr. Hendrickson's Motion save only *Sims v. United States*, a Supreme

Court case which squarely supports Mr. Hendrickson's Motion with remarkable precision and aptness, as is discussed below.

The Supreme Court instructs us that the "dictionary definition" of a term being statutorily defined (or any definition provided elsewhere) is to be disregarded when construing the term:

> "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart,* 530 U.S. 914 (2000),
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> "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene,* 481 U.S. 465 (1987); see also *Western Union Telegraph Co. v. Lenroot,* 323 U.S. 490 (1945)).

To construe any statutory definition, however worded, as a mere supplement of a definition found elsewhere impermissibly disregards the Supreme Court's well-settled doctrine.

Further, such construction treats the term being defined ("person") as somehow injecting an "ordinary meaning" from some other source into its own statutory definition (contrary to the Supreme Court's doctrine), and, in this case, reading the term "includes" in the definition as actually saying "also includes" (even though the word "also" does NOT, in fact, appear). This means inserting words not actually legislated, reading the relevant statute as:

> *§7343. Definition of term "person"*
> *The term "person" as used in this chapter* ***[has an "ordinary (but unstated) meaning"--that is, one from outside this statutory definition-- which also]*** *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.*

However, if this were the congressionally-intended meaning, §7343 would NOT begin with the distinct (and distinguishing) expression, "Definition of term "person"", but would simply say, "The term "person" as used in this chapter" and would continue with "**also** includes…" (albeit, inexplicably, unless the external definition is itself narrow and exclusive). §7343 does not say this, and to treat it as though it does is to disrespect both clearly expressed,

relevant Supreme Court doctrine and plain Congressional intent.

> "Where the legislature has defined words which are employed in a statute, its definitions are binding on the courts since the legislature has the right to give such signification as it deems proper to any word or phrase used by the statute, irrespective of the relationship of the definition to other terms." *People v. Dugan*, 91 Misc. 2d 239, 397 N.Y.S.2d 878 (County Ct. 1977) (73 Am Jur 2d § 146).
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> "[T]he [defined] term may not be given the meaning in which it is employed in another statute, although the two may be in pari material." *Davison v. F. W. Woolworth Co*., 186 Ga. 663, 198 S.E. 738, 118 A.L.R. 1363 (1938) (73 Am Jur 2d § 146).

2. "Includes" neither says nor means "also includes". Instead, "includes" as used in §7343 (and elsewhere in federal tax law) means "includes only the class of things illustrated by the following enumeration". This construction is well-settled law, supported by every possible authority (and no authority of any kind supports reading "includes" as meaning "also includes"):

> "[T]he terms 'includes' and 'including' . . . shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. §7701(c). In light of this we apply the principle that a list of terms should be construed to include by implication those additional terms of like kind and class as the expressly included terms. *fn2: This follows from the canon noscitur a sociis, "a word is known by the company it keeps." *Neal v. Clark*, 95 U.S. 704, 708-09 (1878)." *Brigham v. United States*, 160 F.3d 759 (1st Cir. 1998)

In *Neal v. Clark* the Supreme Court explains that the "illustrative sampling" in a statutory definition such as that of "person" at issue here dictates the meaning of the term defined:

> "'[T]he meaning of a word may be ascertained by reference to the meaning of words associated with it.' …[T]he coupling of words together shows that they are to be understood in the same sense.'" *Neal v. Clark*, 95 U.S. 704 (1877)

Thus, when ""person" as used in this chapter" is illustrated (coupled) with the specific examples of *"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"*, then "person" as used in the chapter is to be "understood in the same sense" as these examples, the common-- and therefore defining-- characteristics of which are that they *act as agents of another entity, and in*

satisfaction of a duty attendant upon their position as such. "Person" as so used CAN also mean others of like kind and class as these-- a "kind and class" which is self-evidently a narrow subclass of "persons" however otherwise defined elsewhere.

The high court re-iterates this principle with specific reference to tax law provisions:

> "**[T]he verb "includes" imports a general class, some of whose particular instances are those specified in the definition**. This view finds support in §2(b) of the Act, which reads: "The terms 'includes' and 'including,' when used in a definition contained in this title, shall not be deemed to exclude other things otherwise within the meaning of the term defined."" *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 fn. 1 (1934). (Emphasis added.)

As the Supreme Court says here, the "includes" rule (codified as 26 USC §7701(c)) means that a definition in which the term "includes" is used is one of a "general class," the characteristics of which are illustrated (NOT "added to") by the particular instances specified. Since the enumerated items illustrate the class, they provide the term defined ("person," "employee," "trade or business," etc.) with its meaning. They are not being added to a pre-existing meaning; rather they are particular instances illustrating the unique, custom meaning of the term being created for purposes of a given section, chapter, title, etc. Again, in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941) and referring to *Helvering v. Morgan's*:

> "[I]ncluding... ...connotes simply an illustrative application of the general principle." (That is, the enumerated items "illustrate", rather than "add to", the application of the defined term).

3. In *Sims v. United States*, 359 U.S. 108 (1959) the Supreme Court applies the foregoing doctrine directly to a definition of "person" at 26 USC §6332(c) identical to that of §7343, and rules that Petitioner Sims qualifies as a "person" <u>because he was of like kind and class</u> as *"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 surrender the property or rights to property, or to discharge the obligation."*:

> "Though the definition of 'person' in §6332 [at 6332(c)] does not mention States or any sovereign or political entity or their officers among those it 'includes', it is equally clear that it does not exclude them. This is made certain by the provisions of §7701(b) of the 1954 Internal Revenue Code that 'The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.' 26 U.S.C. (Supp. V) §7701(b), 26 U.S.C.A. §7701(b)."(*Sims* at 112); and,
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> "Being a person who, under the law of West Virginia, was obligated with respect to the salaries covered by the Government's levies, petitioner is, by §6332(b), made personally liable to the Government" (*Sims* at 114).

Sims was NOT deemed to be a "person" for purposes of §6332 based on reasoning that while not explicitly within the narrower definition at §6332(c) he could nonetheless be relevantly deemed a "person" due to the "code-wide" definition at §7701(a)(1) (which is never mentioned in the ruling), or any other alternative or "supplemented" definition. On the contrary, Sims was deemed to be covered only because he and the State of West Virginia shares the characteristics of the limited class established by §6332(c), and thus, that definition does not exclude them. By plain implication, had Sims and West Virginia NOT been of like kind and class, the definition WOULD have excluded them.

4. In light of the foregoing well-settled law, and the fact that the legislature is presumed to know what it is saying and how to say what it means, §7343 must be recognized as a distinctly-expressed definition of "person" for purposes of chapter 75, meaning only those of like kind and class as "*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*".

Since Mr. Hendrickson was not an agent *who as such was under a duty* to file the returns or documents involved in the charges (and since the government offered no evidence alleging to prove the contrary, but instead merely made the specious argument that "person" under the statute means "everybody"), Mr. Hendrickson was not a "person" chargeable under §7206(1), and Mr. Hendrickson's pre-trial motion to dismiss should have been granted. Further, since the

government offered no evidence alleging to carry its burden of proof during trial as to this element of the offense charged, the Court should have directed a verdict of acquittal upon Mr. Hendrickson's motion at the close of the prosecution's case-in-chief, and should remediate this error by doing so now.

B. The Prosecution Failed to Carry Its Other Burdens of Proof Throughout Trial

1. No evidence that Mr. Hendrickson received "wages" was introduced during trial. This was explicitly acknowledged by the judge in clear terms. Transcript pp. 267-268 and 435-437. Therefore it is not possible that the prosecution met its burdens of proof on even the most rudimentary level, and the court was obliged to direct a verdict of acquittal at the close of the prosecution's case-in-chief:

> "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." *FRCr.P 29(a)*

Similarly, no evidence was presented alleging to support the proposition that Mr. Hendrickson was in "a legal relationship of employer-employee" (which the "interpretations" of the statutes defining "wages" given by the court to the jury in lieu of the actual words of the law declare to be a necessary predicate for any payments actually made to qualify as "wages"). The prosecution's failure to attempt to make its case in these respects not only requires acquittal, but makes clear that this prosecution was brought in bad faith.

> " " 'The law creates a presumption, where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, that his testimony, if introduced, would be adverse to his interests.' " *Meier v. CIR*, 199 F.2d 392, 396 (8th Cir.1952) (quoting 20 Am.Jur., Evidence §190, page 193)." *Gray v. Great American Recreation Association, Inc*., 970 F.2d 1081 (2nd Circuit, 1992).

It bears noting that though its definition was not provided to the jury, leaving that body in the inappropriate position of having to speculate as to the meaning of the statutes, "legal

relationship of employer and employee" has NOT gone undefined elsewhere. As laid out in the Federal Register published on Tuesday, September 7, 1943 in response to the adoption of the Current Tax Payment Act of 1943:

> *§404.104 Employee. The term "employee" includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term specifically includes officers and employees whether elected or appointed, of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.*

In any event, no evidence was presented purporting to establish or demonstrate such a relationship at all. On the contrary, the only time the subject was raised in trial was when Warren Rose, the vice-president of Personnel Management, Inc, and the party responsible for the content of the W-2s involved in this case, testified that he is not familiar with the characteristics of a "legal relationship of employer-employee" and that when he described Mr. Hendrickson as an 'employee', he meant the word "in the sense of its common meaning". Transcript pp. 407-408. The judge, having no independent knowledge of what kind of relationship Mr. Hendrickson was in with Personnel Management, Inc., was obliged to conclude that he was NOT in a "legal relationship" with the company.

Nor was any evidence presented that any payments were made in the course of such a relationship. Indeed, no evidence of any payments having been made was actually presented at all.

Further, the instructions given by the judge as to the fact that no testimony by any prosecution witness constituted evidence of the payment of "wages" and the instruction that "wages" are remuneration paid in connection with "a legal relationship of employer-employee" themselves establish that no evidence of such a relationship was presented, or no evidence of any remuneration paid, or both, even without further consideration. If the payment of "wages" was

not in evidence, then one or both of these components of the payment of "wages" cannot have been in evidence.

2. In addition to the fundamental obligation on an accuser to actually prove its allegations, not just make them, the law requires that in any court proceeding involving allegations of an individual's receipt of "wages" (or "income" under any other name) the government calls down upon itself particular statutorily-specified obligations to produce evidence beyond what is reported on W-2s. The prosecution did not meet this burden, and a verdict of acquittal should have been directed when the prosecution rested its case-in-chief without producing even any evidence as to what was said on the W-2s themselves, much less anything beyond what appears on those forms.

> *26 USC § 6201 -Assessment authority*
> *(d) Required reasonable verification of information returns*
> *In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.*
> ("Subpart B or C of part III of subchapter A of chapter 61" refers to the statutory authorities for W-2s, 1099s, and other "information returns".)

An allegation on an "information return" is "reasonably disputed" merely by a sworn rebuttal, each being of the same legal stature-- Joe's affidavit v. Sam's affidavit. A court is not in a position to unilaterally honor one and dishonor the other. As held by the Fifth Circuit Court of Appeals in ruling a notice of deficiency invalid:

> "[T]he Commissioner's determination that Portillo had received unreported income of $24,505 from Navarro was arbitrary. The Commissioner's determination was based solely on a Form 1099 Navarro sent to the I.R.S. indicating that he paid Portillo $24,505 more than Portillo had reported on his return. The Commissioner merely matched Navarro's Form 1099 with Portillo's Form 1040 and arbitrarily decided to attribute veracity to

> Navarro and assume that Portillo's Form 1040 was false." *Portillo v. Commissioner of Internal Revenue*, 932 F.2d 1128 (1991)
>
> The Eighth Circuit Court of Appeals explains §6201(d) concisely:
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> "Receipt of a Form 1099 does not conclusively establish that the recipient has reportable income. If a recipient of a Form 1099 has a reasonable dispute with the amount reported on a Form 1099, the Code places the burden on the Secretary of the Treasury to produce **reasonable and probative information, in addition to the Form 1099**, before payments reported on a Form 1099 are attributed to the recipient. See I.R.C. §6201(d)." *Mason v. Barnhart*, 406 F.3d 962 (2005); (and see *McCormick v. CIR*, TC Memo. 2009-239). (Emphasis added)
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> Also, there is 26 USC §7491 -Burden of proof:
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> *(a) Burden shifts where taxpayer produces credible evidence*
> *(1) General rule*
> *If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.*
> *(2) Limitations*
> *Paragraph (1) shall apply with respect to an issue only if—*
> *(A) the taxpayer has complied with the requirements under this title to substantiate any item;*
> *(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews;*

No requests have ever been made of Mr. Hendrickson by the Secretary in regard to any of the W-2s involved in this case, and his 4852 forms certainly constitute credible evidence and the expression of a reasonable dispute with respect to "items of income" reported on the "information returns" relied upon by the prosecution in this proceeding. The Tenth Circuit Court has explained that,

> "Credible evidence," as used in §7491(a)(1), means "the quality of evidence, which after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted." *Blodgett v. Comm'r*, 394 F.3d 1030, 1035 (8th Cir. 2005) (emphasis and quotation omitted)." *Rendall v. CIR*, 535 F.3d 1221 (2008); (also see *Major v. CIR*, TC Memo. 2005-141).

Plainly, Mr. Hendrickson's Forms 4852-- sworn statements as to the matters at issue, by a party with direct personal knowledge of the facts-- would suffice to decide the issue of the amount of "wages" received if no contrary evidence were submitted. Furthermore, since a W-2, if uncontested by a 4852, would be taken as sufficient, a 4852, which is merely an IRS-published alternative version of W-2, must be accorded the same stature.

In sum, under these provisions of law, the prosecution was required to produce evidence beyond the mere allegations appearing on those forms; and it was so obliged anyway, frankly. Nothing beyond the mere presentation of copies of those W-2s (and the reading of one number off one of them) occurred throughout the prosecution's entire case. There was not even any testimony as to what was apparently alleged on the W-2s, even though the persons who created those forms were called as witnesses for the prosecution. Thus, those allegations never rose above the status of mere hearsay, as the judge acknowledged during trial. Transcript pp. 435-437.

3. "Willfulness" (the intentional disregard of a known legal duty) can only be demonstrated "by inference" through the showing of the actual existence of a valid, unambiguous legal duty (and all its elements relevant to this case-- such as the actual receipt of what qualifies as "wages"), and the knowledge of that duty, its validity, and its personal application to the one accused of its disregard. None of these things were shown.

Successfully proving each of these elements can support an inference of "willfulness", but these things cannot themselves be only implied by inference if they are to be the basis for the "willfulness" inference. To rely on an inference to prove another inference, and then hold the latter to be "proven beyond a reasonable doubt"-- or even suitable to be put to a jury-- is to stretch a point too far, especially when criminal penalties are the consequence. In this case, the prosecution simply presented a lot of paperwork suggesting (or reflecting) that the allegations on

the W-2s created by a third-party were TREATED as facts by government agencies, without ever presenting any evidence to support those allegations.

> "[T]hat proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between **what is proved** and what is to be inferred. " *Western and Atlantic Railroad v. Henderson,* 279 U.S. 639 (1929). (Emphasis added)

4. It was the obligation of the prosecution to **demonstrate**, not merely "infer", that Mr. Hendrickson was under a duty (and to explain what that duty was and how it could be fulfilled). It made no effort to do so. Indeed, the word "duty" was never uttered by any witness throughout the entire trial. This reflects the prosecution's inability to carry its burden in this respect, and the bad faith with which this prosecution was brought.

> " " 'The law creates a presumption, where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, that his testimony, if introduced, would be adverse to his interests.' " *Meier v. CIR*, 199 F.2d 392, 396 (8th Cir.1952) (quoting 20 Am.Jur., Evidence §190, page 193)." *Gray v. Great American Recreation Association, Inc*., 970 F.2d 1081 (2nd Circuit, 1992).

5. Similarly, it was the obligation of the prosecution to **demonstrate**, not merely "infer", that what appeared on Mr. Hendrickson's forms was "material". It made no effort to do so. This reflects the prosecution's inability to carry its burden in this respect, and the bad faith with which this prosecution was brought.

> "Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not `conjectural' or `hypothetical,'". Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.". Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.".
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> "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations omitted).

Since the prosecution didn't present any witness to testify about government analysis or determinations, it didn't even attempt to bear its burden of proof as to materiality. Indeed, the word "material" used in the sense of "materialty" was never uttered by any witness throughout this trial.

> "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." *United States v. Gaudin*, 15 U.S. 506 (1995)

Furthermore, the record indicates that Mr. Hendrickson's filings were not, in fact, "material", in that the tax agency to which they were submitted ignored more than half of them. Three of the certificate of assessments (for 2002, 2003 and 2004; govt. exhibits 10, 12 and 14) indicate that Mr. Hendrickson's filings were accepted as submitted, but only two prompted agency behavior (the issuing of refunds accordingly). The 2004 return, though properly acknowledged by the Treasury Dept. in its certificate of assessment, has prompted no refund or any other activity. The other filings were apparently ignored by the agency to which they were submitted, as evidenced by govt. certificates of assessment for those years (govt. exhibits 8, 16 and 18), and other relevant documents produced as prosecution exhibits.

Further still, the W-2s the government prefers to unilaterally respect WERE in the hands of the agency to which Mr. Hendrickson's filings were submitted, and were even referred-to on those filings. Thus, this was not a case of testimony made in isolation, in the hope that it would mislead or improperly influence some tribunal. This was a matter of that tribunal being given two differing attestations of belief about the same events, and being permitted to come to its own conclusions.

C. Jury Instructions Regarding the Meaning of the Criminal Statutes Mr. Hendrickson Was Charged with Violating were Inaccurate, Misleading and Prejudicial.

1. Even though expressly requested by a juror during trial and by Mr. Hendrickson, the

Court declined to give the jury the actual words of the statutes relevant to this case, explaining that to do so might cause [it] to 'speculate as to what the legal meaning of the statutes were". Transcript p. 808. This is a plain admission by the Court that it finds the words of the law to be ambiguous, at least, which should have led to a dismissal of the charges.[1] In any event, the judge took it upon himself to "interpret" the legal meaning of the statutes, yet did not remove the ambiguity.

First of all, because both the "wages" definitions at §3401(a) and at §3121(a) contain numerous and lengthy exceptions providing for remuneration paid which does not qualify as "wages" within the meaning of the statutes, the Court's instruction to the jury on that subject was incorrect. Even leaving aside the impropriety of combining a definition of "wages" which hinges on the definition of "employee" in one statutory structure (§3401) and another, separate definition of "wages" which hinges on the definition of "employment" in another statutory structure (§3121), both definitions of "wages," whether rendered separately or improperly combined, could only be accurately described as providing that SOME kinds of remuneration paid to whoever qualifies as an "employee" by whoever qualifies as an "employer" qualify as "wages," but not ALL kinds.

The instruction given misled the jury into believing that the statutes provide that *everyone who works (in any capacity) for anyone else* is an "employee" relevant to the "wages" definitions, and that ALL remuneration paid to an "employee" qualifies as "wages." This is plainly untrue by any reading of the statutes and serves to improperly instruct the jury that if it

[1] In view of *United States v. Enmons*, the fact, stipulated by the government in trial, that thousand of others interpret the statutes the same as Mr. Hendrickson, and that at least two men of common intelligence differ as to its application, either §7206(1) was never applicable to Mr. Hendrickson, or the statutes violate the first essential of due process of law and the ambiguity must be resolved in form of lenity. *United States v. Enmons*, 410 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971); *Rewis v. United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971); *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905, 910 (1955); *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974); *accord United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985). The constitutional avoidance doctrine dictates the Court must assume the first.

concluded Mr. Hendrickson had been paid *anything*, his forms and filings contain objectively false entries. These instructions therefore served to direct conviction as to that element of the charges.

Secondly, the instruction concerning "employee" given to the jury is clearly intended to be used in interpreting the meaning of "wages." That instruction cites both §3401(c) and §3121(d)(2). However, §3121(d)(2) has nothing to do with any definition of "wages." The definition of "wages" in § 3121 is controlled by the specially-defined term "employment," and Congress specifically refrained from making the "wages" defined in that statute reliant upon merely being an "employee" as defined in that section, or receiving remuneration as such.

The Court's instruction has the effect of concealing that critically-important fact. Had Congress meant for the definition of "wages" at §3121(a) to be remuneration paid to anyone meeting the definition of "employee" at §3121(d)(2), it would have said so. Congress DID NOT say so, and thus DID NOT intend for the definition of "wages" at §3121(a) to mean remuneration paid to "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee" (§3121(d)(2)). NEITHER definition of "wages" in the law actually involves remuneration paid to "any individual who has a common employer-employee relationship", such as would be recognized by common law. Nonetheless, the Court constructively instructed the jury to the exact opposite effect, and did so by incorporating a legal term ("legal relationship of employer and employee") without providing a definition of that term.[2]

[2] As previously noted, though its definition was not provided to the jury, leaving that body in the inappropriate position of having to speculate as to the meaning of the statutes, "legal relationship of employer and employee" has not gone undefined elsewhere. As laid out in the Federal Register as published on Tuesday, September 7, 1943 in response to the adoption of the Current Tax Payment Act of 1943:

> *§404.104 Employee. The term "employee" includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term specifically includes officers and employees whether elected or appointed, of the United*

Like the fact that these terms are given definitions in the law, rather than left to their common meanings, that instructions were given as to these terms at all is an acknowledgment that their application is a fact issue; that is, that these terms only apply under certain conditions. No evidence of those conditions being met was presented, and they can't simply be assumed, but must be proven. Rather than meeting its burden, the prosecution operated on the presumption of correctness of third party hearsay and asked the court and the jury to do the same. The Court, however, had a duty to hold the prosecution to its burdens of proof, require the presentation of evidence to support the claims, and properly instruct the jury, or, more properly, dismiss the case for lack of subject matter jurisdiction.

If the Court had instructed the jury using the actual language of the relevant statutes, including the definitions of any defined terms used within them, the jury would likely have arrived at a different verdict entirely. In any event the jury was kept in ignorance of the law and the elements of the charge, and the conviction was predictable.

2. Furthermore, at the very least the statutory definitions not given as written are ambiguous in the view of the Court (if not having the meaning Mr. Hendrickson asserted, and thereby being flatly exculpatory), and the Court plainly admits this.[3] The specifications of what is to be reported on W-2s and Forms 4852 both specifically and exclusively invoke these statutes, and if those statutes do not communicate what is to be reported clearly, then they are void and anything reported in regard to them is a nullity, which includes both the W-2s relied upon by the prosecution, and Mr. Hendrickson's forms, insofar as they concern amounts paid as "wages."

States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

[3] If such is the case, then these statutes themselves are void for vagueness, and any action taken by Mr. Hendrickson or any one else in connection with those statutes, or addressed by charges such as those in the instant case, must be void, as well (or fail any willfulness test, or be resolved in the Defendant's favor).

> "...a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385 (1926).
>
> "In the interpretation of tax statutes it is the established rule not to extend their provisions, by implication, beyond a clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. **Doubts are resolved against the government.**" *Gould v. Gould*, 245 U.S. 151, 38 S. Ct. 53 (1917). (Bold emphasis added.)

The rule that statutes imposing a tax are liberally construed against the government and in favor of the citizen has been repeatedly applied by federal courts where statutory terms are ambiguous. See *Weingarden v. C.I.R.*, 825 F. 2nd 1027, 1029 (6th Cir. 1987); *Dana Corp. v. U.S.*, 764 F. Supp. 482 (N. D. Ohio, 1991). Further,

> "[W]hen the law is vague or highly debatable, a defendant actually or imputedly lacks the requisite intent to violate it." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974); accord *United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985) ("Criminal prosecution for the violation of an unclear duty itself violates the clear constitutional duty of the government to warn citizens whether particular conduct is legal or illegal").

If the law is such as to cause the Court itself to fear that the jury will find it ambiguous, then Mr. Hendrickson is entitled to the benefit of that perceived ambiguity. If he is not so entitled, then the jury should have been given the law as written.

> "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. United States*, 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.

> "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. United States*, 180 U.S. 356, 391, 21 S.Ct. 403 (1901).

Further,

> "'there are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U. S. 620, 272 U. S. 629 (1926); *McNally v. United States*, 483 U.S. 350 (1987) (Cert. to the U.S. Court of Appeals for the Sixth Circuit).

D. Jury Instructions Regarding How to Apply the Law to the Facts in this Case were Confusing and Prejudicial, and/or Improper Exhibits were Admitted into Evidence.

1. Pre-trial rulings properly held that no conclusory/analytical evidence was to be presented unless supported by the testimony of competent witnesses, in conformance to the Supreme Court's *Melendez-Diaz/Crawford* doctrine. This doctrine was nonetheless systematically violated throughout the trial.

The government put no one on the stand who could be questioned about any government record.[4] Nonetheless, a vast number of government records WERE presented to the jury, all purportedly just "normal business records." This, however, was a pretense to legitimacy of evidence.[5]

The judge actually instructed the jury that the documents reflected conclusions. Transcript pp. 267, 436-437. At the same time, the jurors were told that any appearance of analysis or conclusion in these documents was to be disregarded. Transcript pp. 267-268, 436-437. The latter instruction amounts to a declaration that these documents are entirely meaningless, while in combination with the former serves to inevitably confuse the jury, and, in the absence of any instruction as to the evidentiary weight they were to give conclusory

[4] *E.g.*, such as someone who could be made to explain why the date on a proposed liability calculation in regard to the first year involved in the case was before the date Mr. Hendrickson's return was filed.

[5] Many of these records existed in the first place due to someone having come to conclusions of some sort, and most will have appeared to be the consequence of a deliberation of some sort to the jury; that is, they looked like the consequence of someone examining his filings and consciously rejecting them.

statements, actually communicate to the jury the exact opposite message.

Thus, allowing the presentation of these documents was a violation of the *Melendez-Diaz/Crawford* doctrine. These documents, by their nature, invariably contained and/or reflected conclusions or analyses. If, for the sake of argument, they are deemed to be uniquely UN-reflective of conclusions, they were intended to be mistaken as containing and/or reflecting conclusions and analyses, and they still violated *Melendez-Diaz/Crawford*: All should have been barred from introduction in this trial.

In fact, the pretense under which these documents were introduced by the prosecution is apparent, when given even cursory consideration. Supposedly, these documents were allowed in order to suggest to the jury that Mr. Hendrickson should have found himself influenced in his views of the law by the existence of, or having received, these documents (or that Mr. Hendrickson acted in deliberate defiance of what he should have understood from these documents to be wrong). As the judge told the jury:

> *"this 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."* (Transcript p. 267, emphasis added.)

and:

> *"this evidence was admitted only for the purpose of establishing that they [agencies] were of the view, as I had previously instructed you, that* ***IRS was of the view that these payments****, the payments from Personnel Management, Incorporated to Mr. Hendrickson* ***constituted wages and that this view was communicated*** *to Mr. Hendrickson."* (Transcript p. 437, emphasis added.)

That is, MR. HENDRICKSON should have taken these documents as reflecting analysis and conclusions, but the JURY is to take these documents as NOT reflecting any analysis or conclusions, but simply opinions. Taken in combination, this is impossible, even absurd. If these documents do not contain or reflect conclusions or analyses, introducing them for this purpose

improperly manipulates the jury. And if they DO contain or reflect conclusions or analyses, *Melendez-Diaz/Crawford* requires that they be barred. Thus, in either event, their inclusion, and these muddy instructions, constituted error.

Conclusion

In light of the foregoing points of law and fact, as well as others made during trial and in other proceedings and filings in this case, Mr. Hendrickson moves the Court to vacate the jury's verdict and replace it with a judgment of acquittal, or order a new trial.

Dated: February 26, 2010

Attachments: Index of Authorities;
Trial transcript pp. 267, 268, 407, 408, 435, 436, 437, 808;
Government trial exhibits 8, 10, 12, 14, 16, and 18