IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 07-50002

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES THOMAS CLAYTON,

Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION
BEFORE THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
HON. SAM SPARKS, DISTRICT JUDGE PRESIDING

BRIEF OF APPELLANT CLAYTON
ORAL ARGUMENT REQUESTED

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Dated: March 5, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	Case No. 07-50002
CHARLES THOMAS CLAYTON,	)	
	)	
Appellant.	)	

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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Trial court: Hon. Sam Sparks, U.S. District Judge, Western District of Texas.

Respectfully submitted,

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Lowell H. Becraft, Jr.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.4, Appellant Clayton requests that this Court grant oral argument. Because one of the issues presented herein is of first impression, and another concerns sufficiency of the evidence, oral arguments would be of benefit for this Court and would enhance the quality of the Court's consideration of this appeal and decisionmaking.

TABLE OF CONTENTS

Certificate of Interested Persons i

Table of Contents ii

Table of Cases, Statutes and Other Authorities iii

Jurisdictional Statement 1

Statement of the Issues 1

Statement of the Case 2

A. Proceedings in the District Court. 2

B. Statement of the Facts 4

Summary of Argument 8

Argument 10

Issue 1 10

Issue 2 29

Issue 3 46

Conclusion 51

Certificate of Compliance 52

Certificate of Service 53

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases: Page:

Adams v. C.I.R.,
170 F.3d 173 (3rd Cir. 1999) 48

Alamo Express, Inc. v. United States,
613 F.2d 96 (5th Cir. 1980) 17

Alaniz v. Office of Personnel Management,
728 F.2d 1460 (Fed.Cir. 1984) 26, 27

Appalachian Power Co. v. E.P.A.,
208 F.3d 1015 (D.C.Cir. 2000) 23

Appalachian Power Company v. Train,
566 F.2d 451 (4th Cir. 1977) 18

Autenrieth v. Cullen,
418 F.2d 586 (9th Cir. 1969) 48

Batterton v. Marshall,
648 F.2d 694 (D.C.Cir. 1980) 26, 27

Beall v. United States,
336 F.3d 419 (5th Cir. 2003) 47

Brennan v. Ace Hardware Corp.,
495 F.2d 368 (8th Cir. 1974) 20

Brown Express, Inc. v. United States,
607 F.2d 695 (5th Cir. 1979) 17

Brown v. United States,
890 F.2d 1329 (5th Cir. 1989) 36

Brumbelow v. United States,
323 F.2d 703 (10th Cir. 1963) 50

Bunnell v. Barnhart,
336 F.3d 1112 (9th Cir. 2003) 22

Bursten v. United States,
395 F.2d 976 (5th Cir. 1968) 44

Central of Georgia R. Co. v. Wright,
207 U.S. 127, 28 S.Ct. 47 (1907) 49

Chrysler Corp. v. Brown,
441 U.S. 281, 99 S.Ct. 1705 (1979) 19

Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs, 464 F.3d 1306 (Fed.Cir. 2006) 23

Coleman v. United States,
167 F.2d 837 (5th Cir. 1948) 50

Coliseum Square Ass'n., Inc. v. Jackson,
465 F.3d 215 (5th Cir. 2006) 15

Concerned Residents of Buck Hill Falls v. Grant,
537 F.2d 29 (3rd Cir. 1976) 18

Constantino v. TRW, Inc.,
13 F.3d 969 (6th Cir. 1994) 20

CWT Farms, Inc. v. Commissioner,
755 F.2d 790 (11th Cir. 1985) 22

Darland v. United States,
626 F.2d 1235 (5th Cir. 1980) 39

Davidson v. Glickman,
169 F.3d 996 (5th Cir. 1999) 17

Drake v. Honeywell, Inc.,
797 F.2d 603 (8th Cir. 1986) 28

Dufresne v. Baer,
744 F.2d 1543 (11th Cir. 1984) 22

Einhorn v. DeWitt,
618 F.2d 347 (5th Cir. 1980) 15

Estep v. United States,
140 F.2d 40 (10th Cir. 1943) 50

Fano v. O'Neill,
806 F.2d 1262 (5th Cir. 1987) 15

First Family Mortgage Corp. v. Earnest,
851 F.2d 843 (6th Cir. 1988) 19

First State Bank of Hudson County v. United States,
599 F.2d 558 (3rd Cir. 1979) 18

Gatter v. Nimmo,
672 F.2d 343 (3rd Cir. 1982) 18

Graves v. C.I.R.,
579 F.2d 392 (6th Cir. 1978) 48

Gustin v. United States IRS,
876 F.2d 485 (5th Cir. 1989) 47

Hawkins v. Agriculture Stabilization and Conservation Committee,
149 F. Supp. 681 (S.D.Tex. 1957) 20

Hoctor v. U.S. Department of Agriculture,
82 F.3d 165 (7th Cir. 1996) 20, 26

Hotch v. United States,
212 F.2d 280 (9th Cir. 1954) 24

J.P. Stevens Engraving Co. v. United States,
53 F.2d 1 (5th Cir. 1931) 47

Kahn v. United States,
753 F.2d 1208 (3rd Cir. 1985) 48

Kales v. United States,
115 F.2d 497 (6th Cir. 1940) 47

Killip v. Office of Personnel Mgt.,
991 F.2d 1564 (Fed.Cir. 1993) 23

Kwon v. INS,
646 F.2d 909 (5th Cir. 1981) 15

Linoz v. Heckler,
800 F.2d 871 (9th Cir. 1986) 21

Loa-Herrera v. Trominski,
231 F.3d 984 (5th Cir. 2000) 17

Loggerhead Turtle v. County Council of Volusia County,
148 F.3d 1231 (11th Cir. 1998) 22

Lull v. C. I. R.,
602 F.2d 1166 (4th Cir. 1979) 48

Lynch v. United States Parole Com'n.,
768 F.2d 491 (2nd Cir. 1985) 17

Mallette Bros. Construction Co. v. United States,
695 F.2d 145 (5th Cir. 1983) 36

McLouth Steel Prods. Corp. v. Thomas,
838 F.2d 1317 (D.C. Cir. 1988) 23

Mobil Oil Exploration & Producing Southeast, Inc. v. F.E.R.C.,
885 F.2d 209 (5th Cir. 1989) 17

Morton v. Ruiz,
415 U.S. 199, 94 S.Ct. 1055 (1974) 17

Multnomah Legal Serv. Workers Union v. Legal Serv.,
936 F.2d 1547 (9th Cir. 1991) 21

Parker Hannifin Corp. v. United States,
71 Fed.Cl. 231 (2006) 36

Pauldino v. United States,
379 F.2d 170 (10th Cir. 1967) 50

Perez v. United States,
297 F.2d 12 (5th Cir. 1961) 38

Phillips Petroleum Co. v. Johnson,
22 F.3d 616 (5th Cir. 1994) 17, 28

Production Tool Corporation v. Employment and Training Administration,
688 F.2d 1161 (7th Cir. 1982) 25

Pueblo Neighborhood Health Centers, Inc. v. U.S. Dep't. of HHS,
720 F.2d 622 (10th Cir. 1983) 22

Ramey v. Reinertson,
268 F.3d 955 (10th Cir. 2001) 22

Rank v. Nimmo,
677 F.2d 692 (9th Cir. 1982) 21

Reich v. Manganas,
70 F.3d 434 (6th Cir. 1995) 19

Roberts v. Cameron-Brown Co.,
556 F.2d 356 (5th Cir. 1977) 15

Schweiker v. Hansen,
450 U.S. 785, 101 S.Ct. 1468 (1981) 17

Sears v. United States,
343 F.2d 139 (5th Cir. 1965) 43

Sierra Pacific Resources v. United States,
56 Fed.Cl. 366 (2002) 36

Sta-Home Home Health Agency, Inc. v. Shalala,
34 F.3d 305 (5th Cir. 1994) 15

Steiger v. United States,
373 F.2d 133 (10th Cir. 1967) 42

Stoller v. United States,
444 F.2d 1391 (5th Cir. 1971) 47

Stone Forest Industries v. United States,
973 F.2d 1548 (Fed.Cir. 1992) 23

Strauss v. United States,
376 F.2d 416 (5th Cir. 1967) 44

Texaco, Inc. v. FPC,
412 F.2d 740 (3rd Cir. 1969) 28

U.S. Steel Corp. v. U.S. EPA,
595 F.2d 207 (5th Cir. 1979) 16

United States v. Abeyta,
27 F.3d 470 (10th Cir. 1994) 42

United States v. Allen,
127 F.3d 260 (2nd Cir. 1997) 38

United States v. Banks,
988 F.2d 1106 (11th Cir. 1993) 43

United States v. Bellew,
369 F.3d 450 (5th Cir. 2004) 46

United States v. Bello-Bahena,
411 F.3d 1083 (9th Cir. 2005) 42

United States v. Bradfield,
113 F.3d 515 (5th Cir. 1997) 40

United States v. Brooksby,
668 F.2d 1102 (9th Cir. 1982) 45

United States v. Brown,
287 F.3d 965 (10th Cir. 2002) 42

United States v. Brown,
33 F.3d 1002 (8th Cir. 1994) 41

United States v. Buras,
633 F.2d 1356 (9th Cir. 1980) 10

United States v. Campion,
560 F.2d 751 (6th Cir. 1977) 50

United States v. Casperson,
773 F.2d 216 (8th Cir. 1985) 41

United States v. Corrigan,
548 F.2d 879 (10th Cir. 1977) 42

United States v. Curry,
681 F.2d 406 (5th Cir. 1982) 39

United States v. Danehy,
680 F.2d 1311 (11th Cir. 1982) 43

United States v. Delay,
440 F.2d 566 (7th Cir. 1971) 50

United States v. DeLeon,
330 F.3d 1033 (8th Cir. 2003) 26

United States v. Douglas,
818 F.2d 1317 (7th Cir. 1987) 41

United States v. Doyle,
956 F.2d 73 (5th Cir. 1992) 44

United States v. Duncan,
850 F.2d 1104 (6th Cir. 1988) 45

United States v. Eiland,
741 F.2d 738 (5th Cir. 1984) 40

United States v. Escobar de Bright,
742 F.2d 1196 (9th Cir. 1984) 42

United States v. Eshkol,
108 F.3d 1025 (9th Cir. 1997) 29

United States v. Fifty-Three Eclectus Parrots,
685 F.2d 1131 (9th Cir. 1982) 21

United States v. Flom,
558 F.2d 1179 (5th Cir. 1977) 39

United States v. Fowler,
735 F.2d 823 (5th Cir. 1984) 40

United States v. GAF Corp.,
928 F.2d 1253 (2nd Cir. 1991) 38

United States v. Gamache,
156 F.3d 1 (1st Cir. 1998) 37

United States v. Garner,
529 F.2d 962 (6th Cir. 1976) 40

United States v. Gavrilovic,
551 F.2d 1099 (8th Cir. 1977) 25

United States v. Gimbel,
830 F.2d 621 (7th Cir. 1987) 25

United States v. Goldson,
954 F.2d 51 (2nd Cir. 1992) 38

United States v. Gonzalez,
122 F.3d 1383 (11th Cir. 1997) 43

United States v. Goss,
650 F.2d 1336 (5th Cir. 1981) 39

United States v. Grimes,
413 F.2d 1376 (7th Cir. 1969) 41

United States v. Grissom,
645 F.2d 461 (5th Cir. 1981) 39

United States v. Harris,
942 F.2d 1125 (7th Cir. 1991) 50

United States v. Harvey,
659 F.2d 62 (5th Cir. 1981) 14

United States v. Heathershaw,
81 F.3d 765 (8th Cir. 1996) 41

United States v. Indian Trailer Corp.,
226 F.2d 595 (7th Cir. 1955) 44

United States v. Jackson,
726 F.2d 1466 (9th Cir. 1984) 41

United States v. Jones,
418 F.2d 818 (8th Cir. 1969) 50

United States v. Kelton,
446 F.2d 669 (8th Cir. 1971) 50

United States v. Leon,
534 F.2d 667 (6th Cir. 1976) 50

United States v. Levy,
533 F.2d 969 (5th Cir. 1976) 48

United States v. Lewis,
592 F.2d 1282 (5th Cir. 1979) 37

United States v. Lively,
803 F.2d 1124 (11th Cir. 1986) 43

United States v. Lofton,
776 F.2d 918 (10th Cir. 1985) 42

United States v. Lucien,
61 F.3d 366 (5th Cir. 1995) 40

United States v. Manning,
618 F.2d 45 (8th Cir. 1980) 41

United States v. Martin-Trigona,
684 F.2d 485 (7th Cir. 1982) 41

United States v. Mason,
902 F.2d 1434 (9th Cir. 1990) 29, 42

United States v. Megna,
450 F.2d 511 (5th Cir. 1971) 38

United States v. Meyer,
157 F.3d 1067 (7th Cir. 1998) 41

United States v. Mitchell,
495 F.2d 285 (4th Cir. 1974) 44

United States v. Morris,
20 F.3d 1111 (11th Cir. 1994) 45

United States v. Morton,
999 F.2d 435 (9th Cir. 1993) 42

United States v. Nations,
764 F.2d 1073 (5th Cir. 1985) 40

United States v. New York Telephone Co.,
644 F.2d 953 (2d Cir. 1981) 17

United States v. Newcomb,
6 F.3d 1129 (6th Cir. 1993) 40

United States v. O'Connor,
237 F.2d 466 (2nd Cir. 1956) 43

United States v. Opdahl,
930 F.2d 1530 (11th Cir. 1991) 43

United States v. Paolello,
951 F.2d 537 (3rd Cir. 1991) 38

United States v. Pennington,
20 F.3d 593 (5th Cir. 1994) 40, 46

United States v. Phillips,
217 F.2d 435 (7th Cir. 1954) 44

United States v. Picciotto,
875 F.2d 345 (D.C.Cir. 1989) 24

United States v. Prieskorn,
658 F.2d 631 (8th Cir. 1981) 41

United States v. Quattrone,
441 F.3d 153 (2nd Cir.2006) 38

United States v. Reinis,
794 F.2d 506 (9th Cir. 1986) 25

United States v. Riffe,
28 F.3d 565 (6th Cir. 1994) 40

United States v. Rochelle,
363 F.2d 225 (5th Cir. 1966) 47

United States v. Rosi,
27 F.3d 409 (9th Cir. 1994) 10

United States v. Ruiz,
59 F.3d 1151 (11th Cir. 1995) 43

United States v. Shackelford,
677 F.2d 422 (5th Cir. 1982) 39

United States v. St. Michael's Credit Union,
880 F.2d 579 (1st Cir. 1989) 25

United States v. Stowell,
947 F.2d 1251 (5th Cir. 1991) 40

United States v. Taglione,
546 F.2d 194 (5th Cir. 1977) 39

United States v. Thomas,
150 F.3d 743 (7th Cir. 1998) 41

United States v. Timberlake,
559 F.2d 1375 (5th Cir. 1977) 39

United States v. Trujillo,
390 F.3d 1267 (10th Cir. 2004) 42

United States v. Vallejo,
237 F.3d 1008 (9th Cir. 2001) 42

United States v. Vole,
435 F.2d 774 (7th Cir. 1970) 41

United States v. Washington,
688 F.2d 953 (5th Cir. 1982) 39

United States v. Watson,
489 F.2d 504 (3rd Cir. 1973) 38

United States v. Wills,
88 F.3d 704 (9th Cir. 1996) 29

United States v. Wiseman,
274 F.3d 1235 (9th Cir. 2001) 29

United States v. Workopich,
479 F.2d 1142 (5th Cir. 1973) 39

United States v. Yazzie,
188 F.3d 1178 (10th Cir. 1999) 42

United States v. Young,
464 F.2d 160 (5th Cir. 1972) 38

Valen Mfg. Co. v. United States,
90 F.3d 1190 (6th Cir. 1996) 20

Welch v. United States,
750 F.2d 1101 (1st Cir. 1985) 48

Western Radio Servs. Co. v. Espy,
79 F.3d 896 (9th Cir. 1996) 21

Whaley v. Schweiker,
663 F.2d 871 (9th Cir. 1981) 21

Your Ins. Needs Agency, Inc. v. United States,
274 F.3d 1001 (5th Cir. 2001) 47

Statutes and Rules:

5 U.S.C. § 551 12

5 U.S.C. § 552 . . . . , 13, 17

5 U.S.C. § 553 . . . . 14, 18, 21, 25

5 U.S.C. § 558 12

18 U.S.C. §3231 1

26 U.S.C. §151 . . . . 3, 11

26 U.S.C. §6012 . . . . 3, 10, 14

26 U.S.C. §7203 . . . . 2, 5, 10

26 U.S.C. §7206 . . . . 2, 29, 44, 45, 48

26 U.S.C. §7422 . . . . 34, 35, 47

28 U.S.C. §1291 1

26 C.F.R. § 1.861-1 5

26 C.F.R. § 301.6402-2 34

26 C.F.R. § 301.6402-3 . . . . 34, 49

26 C.F.R. §301.6402-2 . . . . 35, 47

Rule 29, F.R.Cr.P. 46

JURISDICTIONAL STATEMENT

The indictment (R.Ex.: 13)[1] was filed in the United States District Court for the Western District of Texas on April 4, 2006, and jurisdiction of the district court for this action was obtained via 18 U.S.C. §3231. After trial of this case before United States District Judge Sam Sparks, the jury found Appellant Charles Thomas Clayton, M.D. ("Clayton") guilty of all counts contained in the indictment (R.Ex.: 19). Clayton was later sentenced on December 15, 2006, and the district court's final judgment of conviction and sentence was filed on December 19, 2006 (R.Ex.: 21). Notice of appeal was timely filed on December 26, 2006 (R.Ex.: 12). This court's jurisdiction of this appeal is obtained via 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

ISSUE 1: Did the district court err in denying Clayton's motion to dismiss based on the argument that the minimum threshold filing requirement amount, the "exemption amount," does not appear in the law?

ISSUE 2: Did the district court err in failing to give Clayton's requested jury instructions numbered 24 and 45?

ISSUE 3: Did the district court err in denying Clayton's post-trial motion for

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[1] The designation "R.Ex.:" refers to the "Record Excerpts" filed herein by the undersigned; the following number after the colon designates the page number of the Record Excerpts where the document may be found.

judgments of acquittal regarding counts 1 and 2?

STATEMENT OF THE CASE

A. Proceedings in the District Court.

On April 4, 2006, a federal grand jury sitting in the Western District of Texas at Austin returned an 8 count indictment against Clayton (Doc. 1[2]; R.Ex.: 13). Counts 1 and 2 thereof charged violations of 26 U.S.C. §7206(1), and alleged that on April 10, 2001, Clayton filed a false, Form 1040X federal income tax return to amend his previously filed tax return for the year 1997 (count 1), and that on April 6, 2002, Clayton filed a false, Form 1040X federal income tax return to amend his previously filed tax return for the year 1998 (count 2). Counts 3 through 8 charged violations of 26 U.S.C. §7203 and asserted that for the tax years 1999 through 2004, Clayton had willfully failed to filed federal income tax returns.

One of the issues for appeal in this case concerns a pre-trial motion to dismiss filed by Clayton.[3] On June 30, 2006, Clayton filed a motion to dismiss counts 3 through 8 of the indictment (Doc. 16), which charged willful failure to file federal income tax returns. Therein, Clayton asserted that the requirement to make federal

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[2] Herein, the designation "Doc." refers to the docket number of pleadings appearing on the district court's docket sheet.

[3] The same argument was raised again via a motion for judgment of acquittal at the conclusion of the trial of this case.

income tax returns is governed by 26 U.S.C. §6012, which in turn relies upon 26 U.S.C. §151(d) for determination of the minimum, threshold filing requirement amount (the "exemption amount"). Clayton noted in his motion that since 1990, this minimum filing requirement amount has been indexed to inflation, but there is nothing in either the tax code or relevant tax regulations that sets forth that amount for each year since 1990. Since an element of a willful failure to file a tax return case concerns a requirement to file such returns, and since the threshold filing requirement is not established by law, Clayton asserted that these counts must be dismissed as a matter of law. On August 2, 2006, the trial court denied this motion (Doc. 31; R.Ex.: 27).

Trial of this case started before U.S. District Judge Sam Sparks on August 21, and ended on August 29, 2006. After this 7 day trial, the jury returned verdicts against Clayton on all counts (Doc. 61; R.Ex.: 19). On September 5, 2006, Clayton filed a timely motion via Rule 29, F.R.Cr.P., attacking his convictions on counts 1 and 2 of the indictment (Doc. 64). The argument raised by that motion was that, as a matter of law, the amended tax returns at issue in these counts were not false returns, but were instead perfectly legal claims for refund. Furthermore, that same motion contended that the evidence was insufficient regarding these 2 counts, thus mandating judgments of acquittal. The district court denied this motion on October 5, 2006 (Doc. 68).

On December 15, 2006, sentencing in this case was held, and Judge Sparks

sentence Clayton to a total of 60 months incarceration on all counts. Judgment was entered on December 19, 2006 (Doc. 80; R.Ex.: 21), and notice of appeal was timely filed on December 26, 2006 (Doc. 81; R.Ex.: 12). Clayton is presently incarcerated.

B. Statement of the facts.

Clayton was born in Dallas, Texas in 1952. For high school, he attended a military academy, graduating in 1970. He thereafter matriculated at the University of Texas in Austin, graduating in 1974 *summa cum laude* with a degree in theoretical math. Then, he enrolled at UT Southwestern Medical School, graduating in 1978. His residency in radiology was completed in June, 1982 (Doc. 85: 173-76)[4].

After practicing 2 years in Dallas, he moved his practice to Denton, Texas, then to Nacogdoches in 1992. In 2001, he moved to Houston, where he worked at various imaging centers reading X-rays (Doc. 85: 177-78). He married in 1987 and has 3 children (Doc. 85: 179).

After graduating from medical school, Clayton started filing income tax returns, eventually having his returns prepared by an accounting firm of which David Smith, a Texas CPA, was a partner. That firm prepared tax returns for Clayton through 1991 (Doc. 85: 180-81).

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[4] The trial transcript of this case appears as Docket Entries 83 through 88 on the district court docket sheet. In this brief, portions of the transcript are designated first by the docket entry, i.e., "Doc. 85," followed by the page number after the colon.

In 1992, Clayton became involved with a trust promoter named Douglas Carpa, who later was investigated by a federal grand jury in Phoenix, Arizona. Clayton was late in filing his 1992 return, and eventually called upon his accountant named David Smith to prepare that return, which was prepared and filed in 1995 (Doc. 84: 72; Doc. 87: 11-13). This resulted in a criminal information being filed by the U.S. Attorney in the Eastern District of Texas against Clayton for violation of 26 U.S.C. §7203 in October, 1996, to which Clayton plead guilty via a plea agreement on January 30, 1997, and received probation (Doc. 87:14-15). At that time, Clayton was also in Chapter 11 bankruptcy due to tax liens (Doc. 87: 16-17).

In August, 1998, Clayton filed his 1997 return that had been prepared by his accountant, David Smith (Doc. 83: 45, 67-68; G.Ex. 17). The following year in October, 1999, Clayton filed his 1998 return that had also been prepared by Smith (Doc. 83: 69; G.Ex. 20). Both of these returns were accurate (Doc. 84: 47-48).

In the spring of 1999 when he lived in Nacogdoches, Clayton was perusing the Internet for tax information and found a website named Taxgate. This website asserted an argument that the domestic income of American citizens was not taxed via the Internal Revenue Code (Doc. 85: 183-184). This argument was premised upon 26 C.F.R. §§ 1.861-1, 1.861-8 (a), and 1.863-1(c), which in essence stated that a "taxpayer's taxable income from sources within or without the United States will be

determined under the rules of §§ 1.861-8 through 1.861-14T for determining taxable income from sources within the United States." In early 2000, this website posted a legal memorandum, *Taxable Income Report*, that had been written by a man named Larken Rose from Pennsylvania (Doc. 85: 219-20; Doc. 86: 17-31). Clayton read this report, found it extremely interesting and engaged in efforts to confirm its accuracy (Doc. 86: 32-69).

In May, 2000, Clayton started communicating by phone and e-mail with Larken Rose, author of the above report (Doc. 87: 42-45). By June, 2000, Clayton and Rose made a decision to set up a website and produce a video explaining Rose's report. The video, Theft by Deception, was finally produced in April, 2002 with financing from Clayton (Doc. 86: 71-84).

Commencing in July, 2000, and continuing for several years, Clayton began writing letters to various federal officials asking questions about the federal income tax. His first letter was sent to IRS Commissioner Rossotti in July, 2000 (Doc. 86: 152-57), and in August he sent a letter to IRS District Director Glenn Henderson (Doc. 86: 157-58). This second letter containing the following request at its end:

> "I hereby formally request that if you believe my conclusions are somehow in error that you help me by presenting me with specific citations from the income tax statutes and regulations that would allow me to correctly determine any income tax liability I may have under the law." (Doc. 86: 159-60).

Neither official answered Clayton's questions.

After searching the Internet for names of Treasury officials, Clayton on October 5, 2000 sent a letter asking a series of 8 questions to David Bergkuist, a lawyer in the Treasury Department. A few months later, a man named Irwin Halpern replied to this letter via one to Clayton dated December 21, 2000 (Doc. 86: 170-75)(G.Ex. 171). In essence, the Halpern letter asserted that Clayton's tax argument was meritless. Upon receipt, Clayton reviewed the case authority mentioned in that letter and concluded that his questions were not answered by Halpern. Clayton replied to Halpern by means of several letters (D.Exs. 51, 52) asking more questions, but received no replies (Doc. 86: 176-86).

In the Fall of 2000 just before Clayton's 1999 return was due, he conferred with his accountant, David Smith, and Smith's employee, Bill Lincoln, about the validity of Rose's tax argument. Smith told Clayton that since he believed the argument so strongly, Clayton should continue filing tax returns and submit claims for refunds (Doc. 84: 78-81). In response to Clayton's tax questions, Lincoln sent to Clayton an e-mail stating that such arguments were incorrect (G.Ex. 40) (Doc. 84: 110-13). However, Clayton was convinced that he was correct and did not file in October, 2000 a return for 1999 (Doc. 87: 29-30), nor did he for the following years.

In the spring of 2001, Clayton contacted a former IRS Special Agent named Joe Banister for assistance in preparing amended tax returns. Banister showed Clayton

how to do so and in April, 2001, Clayton prepared a Form 1040X to amend his 1997 return; attached thereto was a lengthy explanation about why Clayton thought his income was not subject to tax (G.Exs. 18, 18B). In similar fashion, Clayton submitted a Form 1040X for 1998 the following year in April, 2002 (G.Exs. 21, 21B). Clayton's purpose in submitting both of these amended tax returns was to pursue claims for refunds (Doc. 86: 109-150).

In early 2002, Clayton met with a Texas lawyer named John Green at a Starbucks in The Woodlands, Texas. During this 3 hour meeting and presentation, Clayton showed a wealth of documentation to Green about his tax argument, and Green told Clayton he was correct (Doc. 86: 103-106; Doc. 87: 136-140).

SUMMARY OF ARGUMENT

Issue 1: In counts 3 through 8 of the indictment, Clayton was charged with the offense of willful failure to file income tax returns, these counts concerning the years 1999 through 2004. One element of this offense is a legal requirement to file a federal income tax return. Historically, the minimum amounts of income triggering this requirement to file a return appeared in the body of the tax laws. But in 1990, this minimum amount, the "exemption amount," vanished from the law, to be found only in publications of the IRS.

In the first issue presented here by Clayton, it is shown by a wealth of

decisional authorities, including many from this circuit, that publications of a federal agency do not carry the force and effect of law, and such cannot be used to impose legal requirements on the public or Clayton. Clayton moved the district court to dismiss these counts of the indictment, but that court erroneously denied such motion.

Issue 2: Counts 1 and 2 of the Clayton indictment charged that he filed with the IRS false, amended federal income tax returns, Forms 1040X. But at trial, several witnesses testified that these amended tax returns were “claims for refunds”, which consequently were not false. To support this defense theory, Clayton submitted two requested jury instructions seeking to have the jury instructed about the process by which a taxpayer may submit a claim for refund. If the jury here had believed that these amended returns were claims for refunds instead of false returns, Clayton would have been acquitted for these two counts. The district court’s denial of these requested defense instructions was thus error.

Issue 3: The evidence as to whether the amended returns Clayton submitted to the IRS were false or not as charged in counts 1 and 2 was at best ambivalent: if IRS witness Swicegood stated that such returns were false, she was contradicted by two other witnesses, Clayton himself and his accountant David Smith. After trial, Clayton file a post-trial motion seeking acquittal on these two counts, but the district court erroneously denied this motion.

ARGUMENT

ISSUE 1: Did the district court err in denying Clayton's motion to dismiss based on the argument that the minimum threshold filing requirement amount, the "exemption amount," does not appear in the law?

Standard of review: The validity of an indictment is reviewed *de novo*. See *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994).

The indictment here charged in counts 3 - 8 violations of 26 U.S.C. §7203 for the years 1999 through 2004. The elements of this offense are: (1) Clayton was required by law to file income tax returns for these years, (2) he did not file such returns, and (3) his failure to file those returns was committed willfully. See *United States v. Buras*, 633 F.2d 1356, 1358 (9th Cir. 1980).

In response to the indictment, Clayton filed a motion to dismiss (Doc. 16) that asserted via the argument set forth below that, as a matter of law, the first above element was deficient. The district court erroneously denied that motion (Doc. 31).

The Government maintains that the duty to file federal income tax returns is based on the requirements of 26 U.S.C. §6012. Through 1980, §6012 of the 1954 Internal Revenue Code set forth specific amounts that required the making of an income tax return. But via the Economic Recovery Tax Act of 1981 (Pub. L. 97-34, 95 Stat. 172), those amounts were deleted from this section. Section 104(d) of this act,

95 Stat. 189, substituted the term, "exemption amount," for the specific sums in §6012 that triggered the requirement to make a return: $3300, $4400, $5400, and $1000. "Exemption amount" was thereafter determined by §151 of the Code. But by the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508, 104 Stat. 1388), §151(d) of the 1986 Internal Revenue Code was amended so that the exemption amount was indexed to inflation; see §11104(a) of that act (104 Stat. 1388-407). Since 1990, nothing has appeared in either the Internal Revenue Code or the relevant tax regulations that sets forth any specific amount that compels the filing of an income tax return.[5]

Count 3 of the Clayton indictment (Doc. 1; R.Ex.: 13) alleged that the threshold filing requirement amount for 1999 was the sum of $12,700. Count 4 alleged that such

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[5] Prior income tax acts set forth in the law itself the amounts which "triggered" the requirement to file income tax returns. See the 1894 income tax act, 28 Stat. 509, ch. 349 (§29, 28 Stat. at 554); the 1913 income tax act, 38 Stat. 114, ch. 16 (§ II D, 38 Stat. at 168); the Revenue Act of 1916, 39 Stat. 756, ch. 463 (§8, 39 Stat. at 761); the Revenue Act of 1918, 40 Stat. 1057, ch. 18 (§223, 40 Stat. at 1074); the Revenue Act of 1921, 42 Stat. 227, ch. 136 (§ 223, 42 Stat. at 250); the Revenue Act of 1924, 43 Stat. 253, ch. 234 (§223, 43 Stat. at 280); the Revenue Act of 1926, 44 Stat. 9, ch. 27 (§223, 44 Stat. at 37); the Revenue Act of 1928, 45 Stat. 791, ch. 852 (§ 51, 45 Stat. at 807); the Revenue Act of 1932, 47 Stat. 169, ch. 209 (§51, 47 Stat. at 188); the Revenue Act of 1934, 48 Stat. 680, ch. 277 (§51, 48 Stat. at 697); the Revenue Act of 1936, 49 Stat. 1648, ch. 690 (§51, 49 Stat. at 1670); the Revenue Act of 1938, 52 Stat. 447, ch. 289 (§51, 52 Stat. at 476); the 1939 Internal Revenue Code, 53 Stat., Part 1 (§51, 53 Stat. Part I at 27); and the 1954 Internal Revenue Code, 68A Stat. (§6012, 68A Stat. at 732).

amount was $12,950 for 2000, count 5 alleged that this amount was $13,400 for 2001, count 6 asserted that this amount was $13,850 for 2002, count 7 alleged that this amount was $15,600 for 2003, and finally count 8 contended that this amount was $15,900 for 2004. But, where in the law are the minimum filing requirement amounts of $12,700, $12,950, $13,400, $13,850, $15,600, and $15,900, as alleged in this indictment, found? While such booklets are not in this record, the Government will undoubtedly argue herein that these minimum filing requirement amounts are set forth in the Form 1040 instruction booklets.

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 through 558, governs the issue of whether some publication of a federal agency such as the Form 1040 instruction booklet can impose duties on an individual. These sections mandate that federal agencies publish in the Federal Register a variety of information that affects the rights, duties and obligations of members of the public. A "rule" is defined via §551 as follows:

> "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *"

Section 552 describes in particular detail various items which must be published by federal agencies in the Federal Register:

"(1) Each agency shall separately state and currently publish in the Federal

Register for the guidance of the public–

> * * * *
> "(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> "(E) each amendment, revision or repeal of the foregoing.
>
> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

Thus, current statutes impose stringent requirements upon federal agencies to publish in the Federal Register substantive, legislative rules of general applicability promulgated by them. Any matter required by law to be so published, but which is not, is void and cannot be the basis for the imposition of any sanction or penalty, civil or criminal, against anyone.

Here, the law itself contained nothing setting forth the minimum, threshold amount that mandated the filing of an income tax return for Clayton, nor did any relevant tax regulations. The Government contends that its publication, the Form 1040 instruction booklet, contains the minimum, threshold amount (the "exemption amount" as mentioned in §6012) and that the instruction booklet can thus be used to impose this duty on Clayton, and that the provisions of that booklet have the "force and effect of law." However, this and a number of other courts have reached contrary

conclusions.

In *United States v. Harvey*, 659 F.2d 62, 64 (5th Cir. 1981), Harvey asserted, when sued for foreclosure by the Veterans Administration, that a "VA loan servicing manual —26-3" granted to him a right to bar that foreclosure. In concluding that this manual simply had no force and effect as law, this Court held:

> "Furthermore, '[i]n order for a regulation to have the `force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites.' *Chrysler Corp. v. Brown*, 441 U.S. 281, 301, 99 S.Ct. 1705, 1717, 60 L.Ed.2d 208 (1979). More specifically, the regulation must be a substantive or legislative-type rule — i.e. one 'affecting individual obligations,' *Morton v. Ruiz*, 415 U.S. 199, 232, 94 S.Ct. 1055, 1073, 39 L.Ed.2d 270 (1971) — which has been issued by the agency pursuant to statutory authority and promulgated in accordance with the procedural requirements of the Administrative Procedure Act. *Chrysler Corp. v. Brown*, 441 U.S. at 302-303, 99 S.Ct. at 1718.
>
> "Appellants have failed to convince us that the VA manual has the 'force and effect of law.' First, it is questionable that the loan servicing provisions can be characterized as a substantive rule; they more aptly fall into the category of general statement of agency policy. See 5 U.S.C. § 553(d) (1976). Moreover, appellants have not identified any statute directing the VA to implement a 'foreclosure avoidance' duty by legislative-type regulations, nor have they established that the manual was promulgated or required to be promulgated using the notice and comment procedures of the Administrative Procedure Act. See *Charles v. Krauss Co., Ltd.*, 572 F.2d 544, 549 (5th Cir. 1978); *Gatter v. Cleland*, 512 F. Supp. 207 (E.D.Pa. 1981) (VA manual and circulars regarding VA guaranteed loan program). Indeed, appellants concede, Brief of Appellants at 10, that the manual's provisions are not formal agency regulations."

See also *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 361 (5th Cir. 1977)("HUD has chosen not to publish the Handbook, thus prohibiting it from having the force and

effect of law"); and *Einhorn v. DeWitt*, 618 F.2d 347, 350 (5th Cir. 1980)(IRS procedural rules "do not have the force and effect of law").

In *Kwon v. INS*, 646 F.2d 909, 918 (5th Cir. 1981), a Korean involved in deportation proceedings built part of his defense on provisions of the "INS Operations Instructions", a manual. This Court rejected that defense by commenting that "[u]nlike regulations, Operations Instructions, generally, do not have the force of law." In *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987), this Court noted that "'not all agency publications are of binding force'," and refused to accord the force of law to those INS Instructions. In *Sta-Home Home Health Agency, Inc. v. Shalala*, 34 F.3d 305, 310, fn 11 (5th Cir. 1994), a non-profit, home health provider asserted a claim against the Department of Health and Human Services, part of which was predicated on "§ 604 of the Provider Reimbursement Manual." This Court concluded that such manual "does not carry the force and effect of law."

Most recently in *Coliseum Square Ass'n., Inc. v. Jackson*, 465 F.3d 215, 229 (5th Cir. 2006), this Court was again confronted with the question of whether manuals, booklets or other publications of federal agencies had the "force and effect of law." Here, a variety of parties challenged a HUD revitalization project in New Orleans, and part of their claim was premised upon an assertion that HUD had not complied with its "September 1991 Noise Guidebook". In rejecting this argument, this

Court held:

> "Generally, to be legally binding on an agency, its own publications must have been 'promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.' See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 789-90, (holding Social Security Administration Claims Manual is not binding agency rule); *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987) (holding INS Operations Instructions not binding because 'they are not an exercise of delegated legislative power and do not purport to be anything other than internal house-keeping measures.'); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 900-01 (9th Cir. 1996) (holding that the court reviews non-compliance with an agency 'pronouncement' only if it 'actually has the force and effect of law.'); *Gatter v. Nimmo*, 672 F.2d 343, 347 (3d Cir. 1982) (holding Veteran's Administration publications not binding because they were not promulgated under the APA's rulemaking requirements); *Fed. Land Bank in Receivership v. Fed. Intermediate Credit Bank*, 727 F.Supp. 1055, 1058 (D.Miss. 1989) (holding that directive not promulgated according to APA procedure lacks force and effect of law); see also *Davis Mountains*, 116 Fed. Appx. 3, 9-10 (5th Cir. 2004) (summarizing above case law and holding as result that the Air Force's Handbook is not binding as it was not promulgated according to the APA's procedural requirements)."

Thus in this circuit, no party who has relied upon some agency manual or booklet as being a part of the "law" has prevailed. In order for such a manual or booklet to be "law," it must at least be promulgated as a legislative regulation; if not, it is void. See *U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 212-13 (5th Cir. 1979); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700-02 (5th Cir. 1979); *Alamo Express, Inc. v. United States*, 613 F.2d 96, 98 (5th Cir. 1980); *Mobil Oil Exploration & Producing Southeast, Inc. v. F.E.R.C.*, 885 F.2d 209, 226 (5th Cir. 1989); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994)("This change in valuation

technique dramatically affects the royalty values of all oil and gas leases. Thus, the Procedure Paper should have been published in the Federal Register and offered for notice and comment. A party may not be adversely affected by a rule promulgated in violation of these requirements. 5 U.S.C. § 552(a)(1)"); *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999); and *Loa-Herrera v. Trominski*, 231 F.3d 984, 988-89 (5th Cir. 2000).

The same rule regarding agency manuals or booklets prevails in the Second Circuit; see *Lynch v. United States Parole Com'n.*, 768 F.2d 491, 497 (2nd Cir. 1985)("Moreover, it is clear that the internal procedures manual of an executive agency does not create due process rights in the public. E.g., *Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S.Ct. 1468, 1471, 67 L.Ed.2d 685 (1981) (Social Security Administration claims manual is for internal use; it has no legal force and does not bind the Administration); *Morton v. Ruiz*, 415 U.S. 199, 233-35, 94 S.Ct. 1055, 1073-1074, 39 L.Ed.2d 270 (1974) (Bureau of Indian Affairs manual is for internal use only); *United States v. New York Telephone Co.*, 644 F.2d 953, 959 n. 10 (2d Cir. 1981) (Internal Revenue Service manual does not have the effect of law)"). Similar decisional authority is found in the Third Circuit; see *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 38 (3rd Cir. 1976)(agency manuals, "Watershed Protection Handbook (Handbook) and the Economics Guide for Watershed Protection

and Flood Prevention (Guide)", are "merely internal operating procedures, rather than regulations officially promulgated under the APA or otherwise, [and] they do not prescribe any rule of law binding on the agency"); *First State Bank of Hudson County v. United States*, 599 F.2d 558, 564 (3rd Cir. 1979) (FDIC Manual setting up agency procedure was not substantive rule and did "not have the force of law"); and *Gatter v. Nimmo*, 672 F.2d 343, 347 (3rd Cir. 1982)(VA Manuals "have not been promulgated with the procedural requirements for rulemaking. They have never been intended for or used by anyone other than VA employees. The manual and circulars must be characterized as 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.' 5 U.S.C. § 553(b)(A). Such non-substantive rules are not judicially enforceable").

At issue in *Appalachian Power Company v. Train*, 566 F.2d 451, 455 (4th Cir. 1977), was the failure of the EPA to publish a very lengthy document named the "Development Document" in the Federal Register. This document was 263 pages long and purported to establish standards for effluent emissions. Because the document itself constituted a substantive agency regulation which was not published, it was held invalid:

> "[T]he Development Document is not a validly issued part of the regulations, because it has not been published in the Federal Register, nor have the procedural requisites for incorporation by reference been complied with. With this position we agree, and hold that 40 C.F.R., section 402.12 is not

enforceable for want of proper publication.

> "Any agency regulation that so directly affects pre-existing legal rights or obligations * * *, indeed that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence,' is within the publication requirement. * * * As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms * * *, the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register."

This rule prevails in the Sixth Circuit; see *First Family Mortgage Corp. v. Earnest*, 851 F.2d 843, 845 (6th Cir. 1988)("These publications contain general statements of agency policy and procedure intended to guide either lenders or VA employees. The publications are not substantive regulations that have the 'force and effect' of law under *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), and therefore they do not create an enforceable, mandatory 'foreclosure avoidance duty' or 'refunding duty' on the part of the VA"); *Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995) (OSHA "Internal operating manuals . . . do not carry the force of law, bind the agency, or confer rights upon the regulated entity"); *Constantino v. TRW, Inc.*, 13 F.3d 969, 981 (6th Cir. 1994)(same); and *Valen Mfg. Co. v. United States*, 90 F.3d 1190, 1194 (6th Cir. 1996) (followed *Einhorn*, supra).

In *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), an

internal agency memorandum attempted to set a standard for wild animal containment fences: they had to be at least 8 feet high. Hoctor, a keeper of wild animals, was subjected to enforcement action seeking to have this "rule" applied to him. He appealed adverse agency action, and prevailed. The court noted that a rule having a numerical component is typically a legislative type rule requiring due promulgation via the procedures of the APA. Because that "rule" had not been duly promulgated via the APA, it was determined to be without legal force and effect. See also *Brennan v. Ace Hardware Corp*., 495 F.2d 368, 376 (8th Cir. 1974)("The Government correctly argues that the handbooks cannot have the force or effect of regulations that are binding upon the Secretary. These handbooks are very similar to the handbooks in *Hawkins v. Agriculture Stabilization and Conservation Committee*, 149 F. Supp. 681 (S.D.Tex. 1957), in which the court noted that the handbooks were not published in the Federal Register, were not intended by any government officials to have the force and effect of law, and were only guidelines for government personnel. That rationale applies here").

The Ninth Circuit has a wealth of similar authority. For example, in *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996), that court held:

> "The Manual and Handbook are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. Neither is published in the Federal Register or the Code of Federal Regulations. See *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971), cert. denied, 405

> U.S. 989 (1972). They are not subjected to notice and comment rulemaking; they are not regulations. *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971) (Manual 'does not rise to the status of a regulation')."

See also *Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981)(SSA claims manual has no legal force); *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982)("we need not reach the question whether the Handbook and circulars were the product of the requisite procedures, for we conclude that neither the VA Handbook nor VA Circular 26-75-8 purports to prescribe 'legislative-type' rules enforceable in federal court against the VA"); *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (Customs Service manual "was not entitled to the force and effect of law against the government"); *Linoz v. Heckler*, 800 F.2d 871, 877-78 (9th Cir. 1986)("Since the ambulance rule embodied in section 2120.3F [of agency 'Carrier's Manual'] is substantive and neither required nor specifically authorized by the enabling legislation, the Secretary was required to conform with the notice and comment procedure of section 553 of the APA. Agency rules are invalid if the agency fails to comply with APA requirements"); *Multnomah Legal Serv. Workers Union v. Legal Serv.*, 936 F.2d 1547, 1554 (9th Cir. 1991)("Since the internal documents were not for 'public use,' LSC argues, they are 'not entitled to the force and effect of law against the agency.' We agree"); and *Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003)(SSA manual, HALLEX, has no force and effect as law).

Further, the Tenth and Eleventh Circuits have similar authority; see *Pueblo Neighborhood Health Centers, Inc. v. U.S. Dep't. of HHS*, 720 F.2d 622, 625 (10th Cir. 1983)(HHS manuals do not have force and effect of law, citing *Harvey*, supra); *Ramey v. Reinertson*, 268 F.3d 955, 963 (10th Cir. 2001)("the State Medicaid Manual does not have the force and effect of law, nor is it binding on this court, because it was not promulgated pursuant to the notice and comment requirements of the Administrative Procedure Act"); *Dufresne v. Baer*, 744 F.2d 1543, 1549-50 (11th Cir. 1984) (holding that the United States Parole Commission's parole guidelines do not have the force of law); *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 803 (11th Cir. 1985)("It is settled law that Treasury publications such as the Handbook, which purport to provide a general explanation of the revenue laws, are simply guidelines for taxpayers and do not bind the Commissioner in subsequent litigation"); and *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1243 fn. 11 (11th Cir. 1998)("Service's informal publications are * * * not binding authority").

Finally, the D.C. and Federal Circuits agree with this principle of law. In *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020-21 (D.C.Cir. 2000), at issue was an EPA "Periodic Monitoring Guidance" manual that imposed many duties on electric power companies. The court held this document to be a void rule:

> "EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not 'binding.' * *

> * It is worth pausing a minute to consider what is meant by 'binding' in this context. Only 'legislative rules' have the force and effect of law. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 & n. 31 (1979). A 'legislative rule' is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. If this were all that 'binding' meant, EPA's Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.' See Robert A. Anthony, Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1328-29 (1992), and cases there cited."

See also *Stone Forest Industries v. United States*, 973 F.2d 1548, 1551 (Fed.Cir. 1992) (Forest Service Manual did not have force and effect of law); *Killip v. Office of Personnel Mgt.*, 991 F.2d 1564, 1569-70 (Fed.Cir. 1993)(agency manual has no force and effect as law); and *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, 464 F.3d 1306 (Fed.Cir. 2006)("Dear Manufacturer letter" imposed no duties).

This rule also applies in criminal cases. For example, in *United States v. Picciotto*, 875 F.2d 345 (D.C.Cir. 1989), existing Park Service regulations governed activities in national parks; but here, a number of "additional conditions" applicable

to all demonstrators in Lafayette Park across the street from the Whitehouse were the basis for bringing criminal charges against Picciotto. Her conviction was vacated because the "additional conditions", determined to be legislative rules, had not been adopted pursuant to the APA.

Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954), also provides an excellent example of the application of this legal principle to a criminal case. Here, a federal agency implemented an unpublished regulation which banned commercial fishing in Taku Inlet on the Alaskan coast. Hotch was prosecuted and convicted for violating this regulation and his conviction was at first affirmed on appeal. He filed a petition for rehearing and asserted for the first time on appeal the issue of the non-publication of this substantive rule, and this directly caused a reversal of his conviction. Referring to the APA, the court held:

> "The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently is ineffective."

In *United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986), a conviction for structuring cash transactions exceeding $10,000 was set aside. In *Reinis*, the relevant regulations did not require aggregation of daily currency transactions, and that requirement was allegedly mandated only via the instructions to the applicable CTR form. That court's conclusion is relevant here:

> "Form 4789, however, was never promulgated pursuant to the rule making requirements of the Administrative Procedure Act, 5 U.S.C. § 553. * * * Consequently, Form 4789 is not effective as a regulation."

Similar decisions were made in *United States v. St. Michael's Credit Union*, 880 F.2d 579, 596 (1st Cir. 1989), and *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987)("Therefore, the directions contained on the form constitute nothing more than interpretive rules. See *Production Tool Corporation v. Employment and Training Administration*, 688 F.2d 1161, 1164 (7th Cir. 1982). Although such rules may sometimes be persuasive evidence of the requirements of the statute pursuant to which they were promulgated, they do not themselves have the force of law, and therefore cannot impose a legal duty").

In *United States v. Gavrilovic*, 551 F.2d 1099, 1101 (8th Cir. 1977), the defendants had been convicted of drug offenses, the drugs in question being placed on Schedule I in less than the 30 days required by the APA. The convictions were reversed. See also *United States v. DeLeon*, 330 F.3d 1033 (8th Cir. 2003) (enhancements promulgated by the United States Sentencing Commission in response to the Ecstasy Act were not enacted in conformity with the APA).

Besides *Hoctor*, supra, a couple of other cases are directly relevant to this issue of using numbers contained in the Form 1040 instruction booklets to impose duties on Clayton. For example, in *Alaniz v. Office of Personnel Management*, 728 F.2d

1460, 1467 (Fed.Cir. 1984), that court was required to determine the validity of a reduction in the increase of "cost-of-living adjustments" for federal employees living in Alaska. The percentage annual increase in COLAs for these employees was found to be a "rule" for APA purposes, although void:

> "We have little difficulty in concluding that the district court correctly held that OPM's changes in the COLA methodology fit within the APA's definition of rulemaking. Section 551(5) (1982) defines rulemaking as 'agency process for formulating, amending, or repealing a rule.'
>
> "'These changes [modifications of the criteria in the COLA methodology based on more recent data, changes in consumer preference, and changes in sociological patterns] can be characterized as legislation on an administrative level. They were intended to have a future effect on federal employees receiving COLA compensation in the Anchorage area. In addition, the court has no problem perceiving the changes as amendments to a prescription for wage rates. Based on the foregoing, OPM's modifications of the COLA methodology constitute rulemaking'."

In *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980), that Court reviewed a change in the Department of Labor's method of measuring unemployment for the purpose of allocating CETA funds to the States. In noting that a change in this method would have a substantial impact on a State's right to receive CETA funds, the court held:

> "Advance notice and public participation are required for those actions that carry the force of law. These 'legislative' or 'substantive' rules can be issued only if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area. Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also

narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect. They cannot be set aside by the courts unless found 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'," Id., at 701-02.

"Therefore, the development of statistics no longer serves merely informational purposes, nor does it simply assist preliminary determinations prior to taking effective agency action. Instead, the chain of agency actions leading to allocation of funds under the emergency job program provides for agency discretion at only one link: the selection of statistical methodology for collecting and analyzing unemployment data. This certainly places DOL's selection of a statistical methodology within the APA's broad definition of rule as 'an agency statement . . . designed to implement . . . law,'" Id., at 705.

"The critical question is whether the agency action jeopardizes the rights and interest of parties, for if it does, it must be subject to public comment prior to taking effect," Id., at 708.

Alaniz and *Batterton* are directly relevant here. There is no substantive difference between COLAs (the subject of *Alaniz*) and annual changes in the Consumer Price Index ("CPI"), which is a factor used to determine the minimum filing requirement amount ("exemption amount") for the filing of tax returns. To determine the minimum filing requirement, the Department of Labor must compile the CPI, which is a statistical methodology no different (in a legal sense) from the one used for unemployment purposes by the same Department of Labor in *Batterton*.[6]

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[6] See also *Texaco, Inc. v. FPC*, 412 F.2d 740 (3rd Cir. 1969), involving a regulation requiring payment of interest "compounded monthly" on refunds ordered by the Federal Power Commission; and *Phillips Petroleum Co. v. Johnson*, supra, involving interest rate changes.

Here, no law established the minimum amount which required Clayton to file income tax returns for the years 1999 through 2004, and certainly this is a substantial factor in the important "required to file" element for prosecutions of this type. To remedy this deficiency, the Government relies upon such information allegedly contained in the Form 1040 instruction booklet. The problem is that, based on the above authority including several cases in this circuit, such booklets do not have the "force and effect of law."

At best, such provisions in the Form 1040 instruction booklet can be considered "interpretive" regulations, but these types of "regulations" cannot form the basis for legal action against Clayton, civil or criminal. As noted in *Drake v. Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir. 1986), "while an administrative agency delegated legislative power may sue to enforce its legislative rule, just as it may sue to enforce a statute, it cannot ground legal action in a violation of its interpretive rule. * * * An action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory, rather than mandatory, interpretive rules can never be violated." Here, Clayton's motion to dismiss was erroneously denied because his duty to file the tax returns at issue was fundamentally premised on a duty found only in an interpretive rule which, as the *Drake* court noted, "can never be violated".

ISSUE 2: Did the district court err in failing to give Clayton's requested

jury instructions numbered 24 and 45?

Standard of review: Denial of a jury instruction based on a question of law is reviewed *de novo*. See *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001); *United States v. Eshkol*, 108 F.3d 1025, 1028 (9th Cir. 1997); and *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). Whether there is a factual basis for such requested jury instruction is reviewed for an abuse of discretion. See *United States v. Wills*, 88 F.3d 704, 715 (9th Cir. 1996).

Counts 1 and 2 of the Clayton indictment charged him with offenses proscribed via 26 U.S.C. §7206 (1), making penal the filing of false income tax returns, which in this case concerned amended tax returns for the years 1997 and 1998. During opening arguments, the prosecution specified that the returns in question were false in two respects: both of these amended returns were false by claiming that (1) Clayton's adjusted gross income was "0", and (2) he was entitled to a complete refund of taxes paid for these years (Doc. 83: 22).

To prove this offense, the prosecution called as a witness Leah Swicegood, an employee of the Kansas City Service Center of the IRS (Doc. 83: 43-98). Through her, it was shown that Clayton filed a 1997 income tax return in August, 1998 (G.Ex. 17), and a 1998 tax return in October, 1999 (G.Ex. 20) (Doc. 83: 67-71). The 1997 return reported adjusted gross income of $246,979 (Doc. 83: 68), and disclosed a tax due in

the amount of $82,296. The 1998 return reported adjusted gross income of $243,919 (Doc. 83: 69), and disclosed a tax due in the amount of $82,239. Clayton's CPA, David Smith, testified that both of these returns were accurate (Doc. 84: 47-48).

The false returns at issue in these two counts were also offered through the testimony of Swicegood. She testified that in April, 2001, Clayton filed a Form 1040X for 1997 (G.Ex. 18)(Doc. 83: 48-51), and in April, 2002, he filed a Form 1040X for 1998 (G.Ex. 21)(Doc. 83: 53). But when these exhibits were initially offered, the defense objected that they were incomplete documents and that the exhibits themselves disclosed that Clayton had submitted attachments to these amended tax returns which were not a part of these tendered exhibits (Doc. 83: 60-64). The court agreed with the defense objection. The next trial day, Swicegood was recalled and tendered the missing attachments as G.Exs. 18B and 21B (Doc. 84: 10-21). Consequently, the court admitted into evidence these claimed false returns, G.Exs. 18, 18B, 21 and 21B.[7]

But, a review of the attachments to these amended returns demonstrates that they were not false returns, but instead were claims for refunds. The attachment to the 1997 amended return, G.Ex. 18B, was 75 pages long, and the same for the 1998

[7] For the court's convenience, all of these original and amended returns were attached as exhibits to Clayton's motion for bond on appeal made in this court.

amended return, G.Ex. 21B, was 90 pages long. Both lengthy attachments set forth the "861" argument that domestic incomes of Americans were not taxed via the Internal Revenue Code.

Swicegood described these allegedly false returns as "claims for refund" (Doc. 84: 22, lines 2-8):

"Q: * * * The one that is in evidence, you agree, 18 with 18A – excuse me, 18 with 18B, the 1040X with the attachments for 1997 is a claim for refund?

"A: Yes.

"Q: And likewise, as to 1998 with respect to 21 and 21B?

"A: Yes.

"Q: And they're both in this case claims for refund?

"A: Yes, they are."

David Smith, Clayton's CPA, testified that after Clayton explained to him the "861" argument, he advised Clayton to submit claims for refunds (Doc. 84: 78):

"Q: What did you advise him to do?

"A: I told him to file the returns and continue to file the returns and pay his taxes, and then file a claim for refund and, you know, handle the matter in, you know, civil district court.

"Q: And what would he have to attach to his 1040X in order to get into district

court on a refund suit?

"A: Well, I mean, he'd have to state his position, you know, thoroughly, you know, in the claim for refund."

Further, see Doc. 84: 79-82.

Clayton testified at length regarding the reasons as to why he sent the IRS what were claimed as "false" returns but which were in his view claims for refunds (Doc. 86: 107-150). After his studies of the tax laws, Clayton believed that what he earned as a radiologist was not taxed. He contacted an accountant named Joe Banister who was familiar with the process of making claims for refunds. Clayton himself prepared the amended returns for 1997 and 1998 (G.Exs. 18 and 21), sent them to Banister for approval, and then sent them to the IRS. The attachments to these amended returns, G.Exs. 18B and 21B, explained his legal argument regarding his position that what he earned was not taxed via the Internal Revenue Code. Clayton testified (Doc. 86: 143, lines 14-24):

"Q: In reference to both of those 1040Xs that you filed in '97 and '98, in 2001 and 2002, were they false returns?

"A: No, they were not.

"Q: Did you believe that the zeros that had been put in those columns were false?

"A: No. That's what you do if you believe your income is exempt.

"Q: Did you believe that you were following the right procedure for filing a 1040X?

"A: Yes, sir."

And it was Banister who was instructing Clayton as to the method for making claims for refunds (Doc. 86: 145). Clearly, pursuant to advice given to him by two CPAs, Clayton submitted these Forms 1040X as claims for refunds (Doc. 86: 150):

"Q: What, if any, plans did you have regarding further actions you would take in reference to those claims for refunds?

"A: Well, it depended on the reply. If the refund was granted, there was nothing else to do. If the refund was denied, then I had plans to take it to district court.

"Q: In a lawsuit?

"A: Yes, sir."

Via the Internal Revenue Code and corresponding regulations, one may make a claim for refund of taxes by means of Form 1040X:

26 U.S.C. §7422: Civil actions for refund.

"(a) No suit prior to filing claim for refund.
"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the

Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

26 C.F.R. § 301.6402-2: Claims for credit or refund.

"(a) Requirement that claim be filed. (1) Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer. Furthermore, under section 7422, a civil action for refund may not be instituted unless a claim has been filed within the properly applicable period of limitation.

"(b) Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit."

26 C.F.R. § 301.6402-3: Special rules applicable to income tax.

"(a) In the case of a claim for credit or refund filed after June 30, 1976–
"(1) In general, in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return.
"(2) In the case of an overpayment of income taxes for a taxable year of an individual for which a Form 1040 or 1040A has been filed, a claim for refund shall be made on Form 1040X ('Amended U.S. Individual Income Tax Return')."

The relevant law in respect to claims for refunds was aptly and correctly summarized in two requested jury instructions submitted by Clayton (Docs. 38, 51; R.Ex.: 43-44):

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 24

REFUND LAWSUITS

If a taxpayer has filed a return and paid taxes for a prior year, he may seek a refund of taxes paid for that year. This is accomplished by filing a Form 1040X within 3 years thereof. If such claim is denied, a taxpayer may sue to recover the refund and may assert in such refund lawsuit whatever legal arguments he believes are valid.

Refund jurisdiction: 26 U.S.C. §§7422, 6511, and 26 C.F.R. §301.6402-2(b)(1).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 45

REFUND SUITS

A taxpayer is barred from raising in a refund suit grounds for recovery not clearly and specifically set forth in his claim for a refund on Form 1040X, including all attachments. All grounds upon which the taxpayer relies must be stated in his claim for refund so as to apprise the IRS of what to look into. Anything not raised in the claim cannot be raised later in a suit for a refund. The refund suit must be filed in either a federal District Court or a Claims Court, but cannot in Tax Court.

See *Mallette Bros. Construction Co. v. United States*, 695 F.2d 145 (5th Cir. 1983); *Brown v. United States*, 890 F.2d 1329 (5th Cir. 1989); *Sierra Pacific Resources v. United States*, 56 Fed.Cl. 366 (2002); and *Parker Hannifin Corp. v. United States,* 71 Fed.Cl. 231 (2006).

These requested instructions embodied Clayton's theory of defense regarding counts 1 and 2: Clayton asserted that these amended returns were not false returns, but

instead were proper and lawful claims for refunds. There certainly was a factual basis in this record for claiming that these amended returns were claims for refunds and not false returns, and the jury in this case could have easily, based on these facts, agreed with Clayton and acquitted him on these counts. Consequently, the above two requested instructions were critical theory of defense instructions.

At first, the district court had no problem with instructing the jury regarding this matter of claims for refunds, and this topic was covered in the first set of proposed instructions that the court intended to give the jury. But, during the charge conference, both parties objected to the court's proposed instructions in this respect (Doc. 87: 184-187). To solve this problem, the trial court decided to completely eliminate this topic from its final charge: "Well, both of you have convinced me that this is a gratuitous instruction, anyway. I will take it off" (Doc. 87: 187, lines 23-24). To the failure of the trial court to instruct regarding this matter of claims for refunds addressed in Clayton's requested jury instructions 24 and 45, Clayton objected (Doc. 87: 191). It was reversible error for the trial court to not instruct this jury as Clayton sought via these requested instructions.

"It has long been well established in this Circuit that it is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused

innocent." See *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979). A number of convictions have been reversed for failure of a trial court to give juries theory of defense instructions. See *United States v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998)(defendant charged with interstate travel for purpose of engaging in an illegal sexual act with minors was entitled to instructions on entrapment defense; court held a "criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it. See id. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can plausibly support the theory of the defense"); *United States v. GAF Corp.*, 928 F.2d 1253, 1262 (2nd Cir. 1991) (securities prosecution where conviction was reversed for failure to give theory of defense instructions); *United States v. Goldson*, 954 F.2d 51 (2nd Cir. 1992) (defendant charged with assaulting a federal officer was entitled to instructions regarding his lack of knowledge that victim was federal officer); *United States v. Allen*, 127 F.3d 260, 265 (2nd Cir. 1997) (regarding a "loan sharking" case, court held that "the charge in this case was unbalanced and failed to present a defense theory with strong support in the

evidence"); *United States v. Quattrone*, 441 F.3d 153, 177 (2nd Cir.2006) ("nexus" requirement for charge of obstructing an investigation, a theory of defense in this case, was not given to jury and caused reversal); *United States v. Watson*, 489 F.2d 504 (3rd Cir. 1973)(conviction reversed for failure to give requested entrapment instruction); *United States v. Paolello*, 951 F.2d 537, 539 (3rd Cir. 1991)(justification theory of defense related to felon gun possession charge should have been subject of instruction); *Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir. 1961)(theory of defense in this drug case should have been given); *United States v. Megna*, 450 F.2d 511 (5th Cir. 1971)(failure to give alibi instruction in Post Office burglary case was error); *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972)(failure to instruct regarding intent in case of assaulting a federal officer caused reversal); *United States v. Workopich*, 479 F.2d 1142 (5th Cir. 1973) (failure to give entrapment instruction in heroin case was error); *United States v. Taglione*, 546 F.2d 194, 198 (5th Cir. 1977)(failure to give "finder fee" theory of defense instruction in extortion case caused reversal); *United States v. Flom*, 558 F.2d 1179, 1185 (5th Cir. 1977)(in prosecution for Sherman Act violations, theory of defense about "flow" of interstate commerce should have been given); *United States v. Timberlake*, 559 F.2d 1375, 1379 (5th Cir. 1977)(failure to give entrapment instruction in drug case was error); *Darland v. United States*, 626 F.2d 1235 (5th Cir. 1980)(failure to give requested instruction

on reputation evidence caused reversal); *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. 1981)(failure to give "intent to defraud the government" instruction was error); *United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981) (failure to instruct jury about "good faith" defense in mail fraud case involving sale of crude oil was error); *United States v. Shackelford*, 677 F.2d 422 (5th Cir. 1982) (abandonment theory of defense in theft of government property case should have been subject of jury instruction); *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982)(theory of "good faith" defense in mail fraud case should have been given); *United States v. Washington*, 688 F.2d 953 (5th Cir. 1982) (in mail fraud prosecution involving county official and kickbacks, "unsolicited gifts" theory should have been the subject of an instruction); *United States v. Fowler*, 735 F.2d 823 (5th Cir. 1984)(failure to give "good faith" theory of defense in mail fraud prosecution caused reversal); *United States v. Eiland*, 741 F.2d 738, 742 (5th Cir. 1984)(it was error not to instruct regarding defendant's failure to testify, especially when requested); *United States v. Nations*, 764 F.2d 1073 (5th Cir. 1985)(trial court erred in prosecution for interstate transportation of a stolen motor vehicle by not giving requested entrapment instruction); *United States v. Stowell*, 947 F.2d 1251 (5th Cir. 1991)(court erred in not giving multiple conspiracy instruction in drug case); *United States v. Pennington*, 20 F.3d 593, 600 (5th Cir. 1994)(truckers charged with possession of marihuana with

intent to distribute asserted theory of lack of knowledge, and failure to so instruct required reversal); *United States v. Lucien*, 61 F.3d 366 (5th Cir. 1995) (defendant's theory of simple possession in prosecution for conspiracy to distribute cocaine base was erroneously denied); *United States v. Bradfield*, 113 F.3d 515 (5th Cir. 1997) (conviction in drug case set aside for district court's refusal to instruct the jury on entrapment); *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976)(theory of defense in bond forgery case was not given, causing reversal); *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993) (justification theory not given in firearms prosecution, compelling reversal); *United States v. Riffe*, 28 F.3d 565 (6th Cir. 1994) (requested duress jury instruction in drug conspiracy case should have been given); *United States v. Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969) (defense of justifiably using reasonable force in prosecution for assaulting federal official should have been the subject of jury instructions); *United States v. Vole*, 435 F.2d 774 (7th Cir. 1970) ("framing" defense in counterfeiting case should have been explained via jury instructions); *United States v. Martin-Trigona*, 684 F.2d 485, 493 (7th Cir. 1982)("good faith" theory of defense in mail fraud case should have been an instruction); *United States v. Douglas*, 818 F.2d 1317 (7th Cir. 1987)(defense of "mere purchasers" in drug case was erroneously not given); *United States v. Thomas*, 150 F.3d 743 (7th Cir. 1998) (buyer-seller instruction in drug case was refused,

causing reversal); *United States v. Meyer*, 157 F.3d 1067, 1074 (7th Cir. 1998) (same); *United States v. Manning*, 618 F.2d 45 (8th Cir. 1980)(defense instruction on possession in felon gun case should have been given); *United States v. Prieskorn*, 658 F.2d 631, 636 (8th Cir. 1981)(court's refusal to give "buyer-seller" instruction in drug case held error); *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985)("good faith" theory in mail fraud case was not given, causing reversal); *United States v. Brown*, 33 F.3d 1002 (8th Cir. 1994)(accessory after the fact defense instructions should have been given); *United States v. Heathershaw*, 81 F.3d 765 (8th Cir. 1996); *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984)(it was error to not give defendant's "lesser included" defense instructions); *United States v. Escobar de Bright*, 742 F.2d 1196, 1198 (9th Cir. 1984)(defense theory in conspiracy case that one cannot conspire with government agent should have been given); *United States v. Mason*, 902 F.2d 1434 (9th Cir. 1990)(defense theory of authorization by FBI should have been given in case involving "pimps" charged with bank fraud); *United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993)(district court erred in refusing to instruct the jury on self-defense); *United States v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001); *United States v. Bello-Bahena*, 411 F.3d 1083 (9th Cir. 2005) (court erred in rejecting defense's proposed jury instruction regarding official restraint); *Steiger v. United States*, 373 F.2d 133 (10th Cir. 1967) (good faith instruction should have been

given); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977)(in case of assault on IRS agents, self-defense theory should have been subject of jury instruction); *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985)(it was error to not instruct the jury about "heat of passion" defense); *United States v. Abeyta*, 27 F.3d 470, 475 (10th Cir. 1994) ("lesser included" instruction should have been given); *United States v. Yazzie*, 188 F.3d 1178, 1185 (10th Cir. 1999) (defense theory in murder case should have been given); *United States v. Brown*, 287 F.3d 965, 977 (10th Cir. 2002)("The district court erred in taking the *mens rea* issue from the jury by refusing to instruct on involuntary manslaughter"); *United States v. Trujillo*, 390 F.3d 1267 (10th Cir. 2004)(court should have given requested "lesser included" instruction); *United States v. Danehy*, 680 F.2d 1311, 1315 (11th Cir. 1982)(failure to give defendant's requested intent instruction required reversal); *United States v. Lively*, 803 F.2d 1124, 1125-26 (11th Cir. 1986)("the district court erred in refusing to instruct the jury that once a co-conspirator becomes a government informer he can no longer be a member of the conspiracy"); *United States v. Banks*, 988 F.2d 1106 (11th Cir. 1993); *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995)(court erroneously refused defense instruction on a mistake of fact defense); and *United States v. Gonzalez*, 122 F.3d 1383 (11th Cir. 1997)(reversed for failure to instruct on "lesser included" offense).

Several cases involving tax prosecutions have been reversed for refusal of a trial

court to give theory of defense jury instructions. For example, in *United States v. Opdahl*, 930 F.2d 1530 (11th Cir. 1991), Opdahl was charged with bribery and conspiracy to bribe an IRS agent. Opdahl's sought a jury instruction on his defense of "compromise" of tax liabilities pursuant to 26 C.F.R. § 301.7122-1. The trial court refused that instruction, but the court of appeals held it should have been given and reversed the conviction. See also *United States v. O'Connor*, 237 F.2d 466, 474 n. 8 (2nd Cir. 1956)(jury charge regarding net worth in net worth tax case was inadequate, requiring reversal); *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965) (entrapment defense offered by sheriff accused of protecting illegal "still" operations should have been given); *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967) (in tax evasion case, requested instructions regarding value of property and corporate existence were not given, causing reversal); *Bursten v. United States*, 395 F.2d 976, 981-982 (5th Cir. 1968)(denial of defense instruction regarding reliance on counsel in tax evasion case caused reversal); *United States v. Doyle*, 956 F.2d 73 (5th Cir. 1992)(refusal to instruct about lesser included offense in tax evasion prosecution was held error); *United States v. Phillips*, 217 F.2d 435, 440 (7th Cir. 1954)(in tax evasion case, reliance on advice of counsel instruction was rejected, and caused reversal: "An argument to a jury, however, on a legal issue, unsupported by an instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the

harmful effect of the court's refusal to instruct"); and *United States v. Indian Trailer Corp.*, 226 F.2d 595 (7th Cir. 1955) (in tax evasion case involving trailer manufacturer, theory of defense based on contention that funds in question were not taxable should have been given).

Some tax convictions concerning false returns have been reversed as the result of a trial court not giving theory of defense instructions. In *United States v. Mitchell*, 495 F.2d 285, 288 (4th Cir. 1974), the defendant was charged with violating 26 U.S.C. § 7206, and accused of underreporting his pay as an employee. He asked for instructions regarding his employee status as well as the funds he received from others also employed with the same employer. The denial of these requested instructions as well as a requested reliance on accountant instruction was held error:

> "The district court's charge to the jury should have at least included the substance of the requested instructions in language sufficiently precise to instruct the jury in the defendant's theory of defense. See Bursten v. United States, 395 F.2d 976, 981-982 (5 Cir. 1968); Perez v. United States, 297 F.2d 12, 15-16 (5 Cir. 1961). Absent militating circumstances, the district court's failure to give the requested instructions constituted reversible error."

See also *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988)("In this false statement tax case, defendant Duncan and defendant Downing, who was Duncan's tax preparer, were acquitted for the tax year 1981 and convicted for the year 1982 of violating 26 U.S.C. § 7206(1) and 7206(2), which prohibit the making and the preparation of a tax return containing a false statement as to a material matter....In

addition, we hold that there was sufficient evidence presented that the District Court should have instructed the jury on taxpayer Duncan's theory that he lacked criminal intent because he relied in good faith upon the professional opinion of a certified public accountant, codefendant Downing"); *United States v. Brooksby*, 668 F.2d 1102, 1105 (9th Cir. 1982)(bookkeeper charged with submitting false tax return was entitled to requested willfulness instruction); and *United States v. Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994) (same).

This court has established a test for determining whether error occurred in failing to give a theory of defense instruction: "The refusal to give a jury instruction constitutes error only if the instruction (1) was substantially correct, (2) was not substantially covered in the charge delivered to the jury, and (3) concerned an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense." See *United States v. Pennington*, 20 F.3d 593, 600 (5th Cir. 1994). Clayton clearly meets this standard: (1) these two requested instructions accurately summarized the relevant law concerning claims for refunds; and (2) the court clearly did not give such instructions, having expressly deleted them from its first draft of the jury instructions. Whether the returns subject to counts 1 and 2 were false or were claims for refunds was a central focus of this trial, and the jury in this case could have easily, based on the evidence, concluded these issues in favor of

Clayton. Thus, the district court erred in not giving these requested instructions.

ISSUE 3: Did the district court err in denying Clayton's post-trial motion for judgment of acquittal regarding counts 1 and 2?

Standard of review: Denial of a post-trial motion for a judgment of acquittal is reviewed *de novo*. *United States v. Bellew*, 369 F.3d 450, 452 (5th Cir. 2004).

Pursuant to Rule 29, F.R.Cr.P., on September 5, 2006, Clayton filed a Rule 29 motion (Doc. 64) arguing that he was entitled to judgments of acquittal regarding counts 1 and 2. After reply by the prosecution (Doc. 67), the district court erroneously denied the same on October 5, 2006 (Doc. 68).

A. Clayton was entitled to judgment as a matter of law.

To assert a claim for a refund of income taxes previously paid, filing a claim for refund in the manner required by the relevant statute and regulations is mandatory, and jurisdictional; see *United States v. Rochelle*, 363 F.2d 225, 231 (5th Cir. 1966). A claim cannot be civilly pursued that is not raised in the supporting documentation which accompanies the claim; see *J.P. Stevens Engraving Co. v. United States*, 53 F.2d 1, 2 (5th Cir. 1931); and *Stoller v. United States*, 444 F.2d 1391, 1393 (5th Cir. 1971)("Section 7422(a) provides that no suit shall be maintained in any court for the recovery of any internal revenue tax until a claim for refund has been filed with the Secretary of the Treasury. Section 301.6402-2(b)(1) of the Regulations provides, in

part, that the claim must set forth in detail each ground upon which a refund is claimed and facts sufficient to apprise the commissioner of the exact basis thereof."). See also *Beall v. United States*, 336 F.3d 419 (5th Cir. 2003); and *Your Ins. Needs Agency, Inc. v. United States*, 274 F.3d 1001, 1003 (5th Cir. 2001). Claims for refunds can be inconsistent; see *Kales v. United States*, 115 F.2d 497, 501 (6th Cir. 1940). In certain circumstances, an informal claim may be valid; see *Gustin v. United States IRS*, 876 F.2d 485 (5th Cir. 1989).

Claims for refunds have been asserted regardless of the merits of the claims. For example, federal courts have confronted several litigants who claimed "war tax" deductions representing those percentages of the federal budget devoted to "war." In *Autenrieth v. Cullen*, 418 F.2d 586, 588 (9th Cir. 1969), that court declared regarding "Viet-Nam" deductions taken on tax returns, "[h]aving duly filed claims for refund, which were denied, plaintiffs undoubtedly have 'standing' in the sense that they have the right to bring this action, whether their claims be meritorious or not." Similar decisions were made in *Kahn v. United States*, 753 F.2d 1208 (3rd Cir. 1985), and *Welch v. United States*, 750 F.2d 1101 (1st Cir. 1985).[8]

In *United States v. Levy*, 533 F.2d 969, 975 (5th Cir. 1976), at issue was the

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[8] See also *Lull v. C. I. R.*, 602 F.2d 1166 (4th Cir. 1979); *Graves v. C.I.R.*, 579 F.2d 392 (6th Cir. 1978); *First v. C. I. R.*, 547 F.2d 45 (7th Cir. 1976); and *Adams v. C.I.R.*, 170 F.3d 173 (3rd Cir. 1999).

provision by the defendant of a Form 433-AB in reference to a collection matter, although this form itself was not authorized by any regulation. Contending that Levy provided false information on this form, he was prosecuted and convicted of violating 26 U.S.C. §7206(1). But on appeal, because the form itself was not authorized by any regulations, this conviction was vacated, the court holding:

> "Due process requires that the taxpayer have notice, by statute or by appropriate regulation duly promulgated thereunder, of the uses to which forms may be put before he may be prosecuted for a felony in connection therewith. We glean from the record that the Internal Revenue Service has used Form 433-AB for many years, but without validating its use with an appropriate regulation."

The decision in *Levy* applies here with particular force. Form 1040X is the subject of but one mention in 26 C.F.R., part 1, the tax regulations for the income tax. That single mention appears in 26 C.F.R. §1.905-4T, involving foreign tax credits. In 26 C.F.R., part 601, Form 1040X is mentioned only in 26 C.F.R. §601.105(e), as a claim for refund. In 26 C.F.R., part 301, this form is mentioned most prominently in 26 C.F.R. 301.6402-3 as a claim for refund. Thus as a matter of law, this form is at least a claim for refund or credit because it is identified as such in these regulations.

In this case, Clayton filed returns for 1997 and 1998 which his accountant testified were accurate, a point not challenged at trial by the prosecution. Pursuant to the relevant tax regulations, a Form 1040X is a claim for refund as this is the only context for which this form is mentioned in the tax regulations. Clayton, via the above

authority, could make a claim for refund based on any legal argument, non-frivolous or meritless. It is clear from the facts that Clayton was making a claim for refund of taxes previously paid and thus could not be charged for filing false returns. Items may be omitted from a tax return on the belief that they are not taxable. See *Central of Georgia R. Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47 (1907). As a matter of law, Clayton's convictions for counts 1 and 2 are required to be reversed.

B. The evidence was insufficient.

In this case, the evidence that the amended returns that were the subject of counts 1 and 2 were false was slight, not even rising to the level of a preponderance of the evidence. The sole evidence that these returns were false was derived from the returns Clayton filed for these years which had been prepared by David Smith (G.Exs. 17 and 20). By comparing these returns with the amended returns (G.Exs. 18, 18B, 21, 21B), one could infer that the latter were false. However, when the attachments to such returns (G.Exs. 18B, 21B), are considered, it clearly appears that these amended returns were claims for refunds. And Clayton himself testified at trial that such was his purpose in filing those amended returns.

Evidence regarding the commission of a crime which is evenly balanced requires the entry of a judgment of acquittal. See *Estep v. United States*, 140 F.2d 40, 45 (10th Cir. 1943)*; Coleman v. United States*, 167 F.2d 837, 838 (5th Cir. 1948);

Brumbelow v. United States, 323 F.2d 703, 705 (10th Cir. 1963); *Pauldino v. United States*, 379 F.2d 170, 172 (10th Cir. 1967); *United States v. Jones*, 418 F.2d 818, 826 (8th Cir. 1969); *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971); *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971); *United States v. Leon*, 534 F.2d 667, 677 (6th Cir. 1976); *United States v. Campion*, 560 F.2d 751 (6th Cir. 1977); and *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991). Here, there was slight evidence that these returns were false. But in contrast, there was a great preponderance of the evidence that these were not false returns, but in fact were valid and legal claims for refunds. Clayton himself testified at length regarding his study of the "§861" legal argument and became convinced it was correct. He consulted attorney John Green who told him that the argument was sound. His accountant, David Smith, told him to submit claims for refunds, and he used accountant Joe Banister to assist him in preparation of these amended returns. Clayton filed those amended returns so that he could pursue a claim for refund in U.S. district court. Clearly, the great weight of the evidence in this case was that Clayton did not file false returns, but amended returns that constituted claims for refunds. For this reason, the convictions on these counts must be reversed.

CONCLUSION

For the reasons noted above, Clayton's convictions must be reversed.

Respectfully submitted this the 5th day of March, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (WordPerfect, Version 11), that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B):

1. Exclusive of the exempted portions specified in Fed.R.App.P. 32(a)(7)(B)(iii), this brief contains fewer than 14,000 words, to wit, less than 13,400 words;

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Lowell H. Becraft, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing brief upon the below named counsel for the United States by depositing the same in the United States mail, postage prepaid, in an envelope addressed to them at their correct mailing addresses:

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Dated this the 5th day of March, 2007.

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Lowell H. Becraft, Jr.