

No. 07-50002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES THOMAS CLAYTON,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEE

EILEEN J. O'CONNOR
Assistant Attorney General

ALAN HECHTKOPF (202) 514-5396
S. ROBERT LYONS (202) 307-6512
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

Johnny K. Sutton
United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.4, counsel for the United States of America respectfully inform the Court that they believe oral argument may be helpful but is not necessary to resolve the issues raised in this appeal.

TABLE OF CONTENTS

	Page
Statement regarding oral argument.....	I
Table of contents.....	ii
Table of authorities.....	ii
Statement of jurisdiction.....	1
Statement of the issues.....	2
Statement of the case.....	2
Statement of the facts.....	3
Summary of the argument.....	7
Argument.....	8
I. The legal duty to file a tax return if gross income exceeds a minimum threshold amount is not negated because the threshold is calculated with reference to the consumer price index.....	8
A. Standard of review.....	8
B. Internal Revenue Code.....	8
C. Consumer price index.....	11
D. Calculating the CPI averages and using tax year 2003 as an example.....	13
E. Defendant’s argument is without merit.....	17
II. The District Court did not abuse its discretion in instructing the jury as to the false return counts when it declined to also instruct the jury as to the legal principles underlying a refund claim.....	20
A. Standard of review.....	20
B. The jury was properly instructed.....	21
C. Defendant’s argument is without merit.....	26
III. Sufficient evidence supported defendant's convictions on the false return accounts.....	26
A. Standard of review.....	26
B. Defendant filed false amended returns and did so willfully.....	27
Conclusion.....	29
Certificate of compliance with type-volume limitation typeface requirements and type style requirements.....	30
Certificate of service.....	31

TABLE OF AUTHORITIES

Page

Cases:

Bill Johnson's Restaurant's, Inc. v. NLRB, 461 U.S. 731 (1983). 25
Cheek v. United States, 498 U.S. 192 (1991). 28
United States v. Adam, 296 F.3d 327 (5th Cir. 2002). 8
Rayner v. Commissioner, No. 02-60565, 2003 WL 21545925 (5th Cir. July 3, 2003). 27, 28
United States v. Ambort, 405 F.3d 1109 (10th Cir. 2005). 24, 25
United States v. Booker, 543 U.S. 220 (2005). 19
United States v. Clayton, No. 9:96CR0025 (W.D. Tex. 1996). 3
United States v. Damon, 676 F.2d 1060 (5th Cir. 1982). 23
United States v. Foster, 229 F.3d 1196 (5th Cir. 2000). 24
United States v. Garcia, 903 F.2d 1022 (5th Cir. 1990). 24
United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998). 18
United States v. Larken Rose, et al., No. 05-CR101 (E.D. Penn.), *appeal pending*, No. 05-5199 (3d Cir.). 4
United States v. Levy, 533 F.2d 969 (5th Cir. 1976). 23
United States v. Martin, 790 F.2d 1215 (5th Cir. 1986). 24
United States v. Nolen, 472 F.3d 362 (5th Cir. 2006). 4
United States v. Penaloza-Duarte, 473 F.3d 575 (5th Cir. 2006). 27
United States v. Simkanin, 420 F.3d 397 (5th Cir. 2005). 23-24
United States v. Simmons, 374 F.3d 313 (5th Cir. 2004). 20, 26
United States v. Taylor, 574 F.2d 232 (5th Cir. 1978). 23
United States v. Wurzbach, 280 U.S. 396 (1930). 16

Statutes:

7 U.S.C. 2014(g)(2). 18
10 U.S.C. 2828. 18
11 U.S.C. 101. 18
12 U.S.C. 1422. 18
16 U.S.C. 460-d. 18
17 U.S.C. 119. 18
18 U.S.C. 371. 26
20 U.S.C. 1087-2. 18
26 U.S.C. 1(f)(4). 10
26 U.S.C. 63(b)(2)(A) (2002). 11
26 U.S.C. 63. 11
26 U.S.C. 151(d)(4)(A)(ii). 10
26 U.S.C. 151. 10
26 U.S.C. 861. 29

	Page
Statutes (continued):	
26 U.S.C. 6012.....	7, 14
26 U.S.C. 7203.....	2, 3, 8, 19
26 U.S.C. 7206(1).....	2, 21, 23
28 U.S.C. 1291.....	1
39 U.S.C. 3622.....	18
42 U.S.C. 415(I).....	18
Miscellaneous:	
26 C.F.R. 301.6402-3(a)(3).....	22

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10531

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES THOMAS CLAYTON

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

Defendant appeals from a judgment of conviction in a criminal case. The District Court's jurisdiction arose under 18 U.S.C. 3231. The District Court entered judgment on December 19, 2006. (R. 21.) 1/ Defendant filed a timely notice of appeal on December 26, 2006. (R.81.) See Fed. R. App. P. 4. Jurisdiction for this appeal lies under 28 U.S.C. 1291.

1/ "R." references are to the docket number of the record filed in the district court. "RT" references, preceded by volume numbers, are to the reporter's transcript of the trial.

STATEMENT OF THE ISSUES

1. Whether an individual's legal duty to file a tax return if his gross income exceeds a minimum threshold amount is negated because the threshold is calculated with reference to the Consumer Price Index.
2. Whether the district court abused its discretion in instructing the jury as to the false return counts when it declined to also instruct the jury as to the legal principles governing a refund claim.
3. Whether sufficient evidence supported defendant's convictions on the false return counts.

STATEMENT OF THE CASE

On April 4, 2006, defendant Charles Thomas Clayton was charged with two counts of making and subscribing a false Amended U.S. Individual Income Tax Return, Form 1040X, for calendar years 1997 and 1998, in violation of 26 U.S.C. 7206(1), and six counts of willful failure to file a tax return, for calendar years 1999-2004, in violation of 26 U.S.C. 7203. (R. 1.)

Trial before a jury and the Honorable Sam Sparks, United States District Judge, began on August 21, 2006. (R. 43.) The jury returned a guilty verdict for all eight counts on August 29, 2006. (R. 61.) On December 15, 2006, defendant was sentenced to a total of sixty months' incarceration. 2/ (R. 76.) Defendant is incarcerated during the pendency of the appeal. (R. 91.)

2/ Defendant was also ordered to pay a fine of \$50,000, costs of prosecution of \$7,455.98, and an assessment of \$350.

STATEMENT OF FACTS

Defendant is a medical doctor with a speciality in radiology. (Govt.Exs. 43, 50; 8/23/06 RT 175.) Up to and including 1991, defendant filed federal income tax returns. (8/23/06 RT 179-180; 8/24/06 RT 70.)

In 1992, defendant became associated with a tax protest organization, The Pilot Connection, that promoted the use of trusts to conceal income and assets as a vehicle for not filing federal income tax returns or paying federal income tax. Defendant created trusts and refused to file a 1992 tax return or pay tax on the income he earned in 1992. (Govt.Ex. 35D.)

In October 1996, a one-count information was filed in the United States District Court for the Eastern District of Texas charging defendant with willful failure to file a federal income tax return for 1992, in violation of 26 U.S.C. 7203. (Govt.Ex. 35A.) Defendant pled guilty to the information pursuant to a plea agreement. (Govt.Ex. 35B.) In January 1997, defendant was sentenced to a year's probation. (Govt.Ex. 35C.) *See United States v. Clayton*, No. 9:96CR0025 (W.D. Tex. 1996). After his conviction and while on probation, which ended in January 1998, defendant filed his delinquent returns. Defendant also filed his 1997 and 1998 returns. (8/24/06 RT 70.)

But by 2000, defendant, who had entered bankruptcy and had to pay delinquent taxes to the IRS, had associated with a tax protestor by the name of Larken Rose, to whom defendant emailed that "by God (or

whatever), I am going to screw [the IRS] for screwing me." 3/
(Govt.Exs. 41, 155, 207, 277; 8/23/06 RT 183-184, 219-220; 8/24/06 RT
17, 24, 71.) Larken Rose promoted the so-called "Section 861 argu-
ment," which asserted that income from domestic sources is not subject
to income tax and that only foreign source income is subject to the
United States income tax. 4/ (8/23/06 RT 172, 192-196; 8/23/06 RT 19.)
As early as June 2000, defendant, in an email to Larken Rose, began
constructing a putative defense to a possible criminal prosecution
against him (Govt.Ex. 208): 5/

I think the best thing for me to do is to get all the infor-
mation together and document it, and by that I mean all
the really solid stuff besides your [Taxable Income]
[R]eport, including the OMB numbers, and the CID
limited jurisdiction and any other list that you can think

3/ In November 2005, Larken Rose was convicted on five counts of willful failure to file a tax return and sentenced to 15 months' incarceration. Attorney Lowell Becraft, who was one of Clayton's attorneys at trial and is his counsel of record on appeal, was one of Rose's trial counsel. See *United States v. Larken Rose, et al.*, No. 05-CR101 (E.D. Penn.), *appeal pending*, No. 05-5199 (3d Cir.).

4/ As part of his effort to increase resistance against the IRS, defendant financed the production of a video promoting the Section 861 argument. (8/24/06 RT 74, 99.)

5/ As part of his effort to create a defense to a future prosecution, defendant also met with other members of the tax protest movement, including Texas attorney John O'Neill Green. (8/24/06 RT 104.) See *United States v. Nolen*, 472 F.3d 362, 370 (5th Cir. 2006) (in the course of representing a tax protestor defendant, attorney Green impugned the integrity of a Magistrate Judge, which resulted in the revocation of Green's *pro hac vice* status.).

of. Then I would document these things to a select few, of course staying away from any tax protestor stuff that has been shown to be invalid, so that if they were ever stupid enough to bring it to court, that knowing what I do about what can be dealt with in criminal court (which is ANYTHING convinced me of my position) that all this stuff would be brought out formally and would kill them dead.

As part of this forward-thinking defense to a criminal prosecution, defendant, at Larken Rose's suggestion, wrote dozens of letters to the IRS and other governmental officials, demanding that they refute the Section 861 argument. (8/23/06 RT 173, 201-202.) Defendant received numerous replies explaining the fallacy of the Section 861 argument, which explanations defendant nominally refused to accept. (Govt.Exs. 171, 172, 173, 206, 213A, 213B.) Between himself and Larken Rose, though, defendant admitted that "[s]ometimes (most of the time) I am so full of [expletive] it amazes me." (Govt.Ex. 280; 8/28/06 RT 89.)

Defendant refused to file returns for calendar years 1999 through 2004, inclusive, despite earning over \$1.5 million during that period (8/23/06 RT 167 Govt.Exs. 229-270):

Tax Year	Gross Income
1999	\$375,749
2000	\$292,760
2001	\$426,099
2002	\$485,449
2003	\$357,402
2004	\$298,512

In addition to refusing to failing to file returns for 1999-2004, defendant filed amended returns for 1997 and 1998, wherein defendant reported his income as zero and sought the refund of over \$167,000 in previously paid tax. Specifically, on April 10, 2001, defendant filed a Form 1040X, Amended U.S. Individual Income Tax Return, for 1997, on which defendant reported his adjusted gross income was not \$246,979, as he had reported on the original return, but \$0, and he claimed a refund of \$82,296. On April 6, 2002, defendant filed a Form 1040X, Amended U.S. Individual Income Tax Return, for 1998, on which defendant reported that his adjusted gross income was not \$243,919 as he had reported on the original return, but \$0, and he claimed a refund of \$85,300. Defendant attached to the amended returns a letter/position statement based on the Section 861 argument. When defendant submitted tax returns in support of an application for life insurance, though, defendant did not submit the amended returns showing zero income, but the original returns for 1997 and 1998, which reported his true and correct income. (Govt.Exs. 18, 203A; 8/23/06 RT 182-183.)

SUMMARY OF ARGUMENT

1. Noting that the Internal Revenue Code calculates the income amounts requiring the filing of a tax return with reference to the Consumer Price Index, *see* 26 U.S.C. 6012, defendant argues that no "law" establishes a minimum filing requirement. Defendant's argument is without merit. The legal duty to file a tax return if one's gross income exceeds a minimum threshold amount is not negated because the threshold is calculated with reference to the Consumer Price Index.

2. Asserting that the law allows him to make a claim for refund based on any legal argument, defendant argues that the jury should have been instructed that any issue not raised in an administrative claim cannot be raised later in a refund suit filed in district court. Defendant contends that if the proffered instructions had been given, the jury might have concluded that his Forms 1040X were not false returns, but in fact were valid and legal claims for refunds. The principle infirmity with defendant's position is his contention that the law allows him to make a claim for refund based on any legal argument; the filing of a false claim for the refund of taxes is a crime. The District Court did not abuse its discretion in instructing the jury as to the false return counts when it declined to also instruct the jury as to the legal principles governing a refund claim.

3. Defendant argues that there was insufficient evidence that he willfully filed a false return, arguing that the Forms 1040X were not false returns, but valid and legal claims for refunds, and that he filed

those amended returns so that he could pursue a claim for refund in the U.S. district court. But there was ample evidence that defendant filed false amended returns and that he did so willfully.

ARGUMENT

I

THE LEGAL DUTY TO FILE A TAX RETURN IF GROSS INCOME EXCEEDS A MINIMUM THRESHOLD AMOUNT IS NOT NEGATED BECAUSE THE THRESHOLD IS CALCULATED WITH REFERENCE TO THE CONSUMER PRICE INDEX

Noting that the Internal Revenue Code (26 U.S.C.) calculates the tax return filing thresholds with reference to the Consumer Price Index, defendant argues that no "law" establishes a minimum filing requirement. Defendant's argument is without merit.

A. *Standard of Review*

Statutory interpretation is reviewed *de novo*. *United States v. Adam*, 296 F.3d 327, 330 (5th Cir. 2002).

B. *Internal Revenue Code*

Defendant was charged with, among other things, six counts of willful failure to file a return, in violation of 26 U.S.C. 7203. Section 7203 provides, in pertinent part, that "[a]ny person required under this title . . . to make a return . . ., who willfully fails to . . . make such return . . . shall, in addition to other penalties, be fined not more than \$25,000 . . . or imprisoned not more than 1 year, or both." 26 U.S.C. 7203. To establish the offense of willful failure to file a return, the government is required to prove: (1) that the defendant was required to

file a return; (2) that the defendant failed to file a return; and (3) that the failure to file a return was willful.

The initial place to start in determining whether an individual is required to file a return is Code Section 6012, entitled "Persons Required to Make Returns of Income." Section 6012(a)(1)(A) specifies the gross income thresholds at which a return is required to be filed, with reference to either the "exemption amount" or the exemption amount and the applicable "standard deduction." Defendant Clayton was married during the prosecution years. Accordingly, two filing options were available to him: "married filing jointly" or "married filing separately." Under the joint return status, a return is required to be filed if the couple's combined gross income equals or exceeds the sum of twice the exemption amount plus the basic standard deduction applicable to a joint return. 26 U.S.C. 6012(a)(1)(A)(iv). If his or her spouse elects the married filing separate status, a return is required to be filed by an individual if the gross income of that individual equals or exceeds the exemption amount.

The exemption amount is determined under Code Section 151, 26 U.S.C. 151. The initial place to start in determining the exemption amount is Section 151(d)(1), which states that "the term 'exemption amount' means \$2,000." Section 151(d)(4) provides for an inflation adjustment by which "the dollar amount contained in paragraph (1)" is increased.

The inflation adjustment is calculated by taking the §151(d)(1) "dollar amount" and multiplying it by the cost-of-living adjustment determined under §1(f)(3), except that instead of using the base year identified in §1(f)(3), 1992, the base year is 1988. 26 U.S.C. 151(d)(4)(A)(ii). Substituting 1988 as the base year, Code Section 1(f)(3) provides that the cost-of-living adjustment for the exemption amount is the percentage by which "(A) the CPI for the preceding calendar year exceeds (B) the CPI for the calendar year" 1988. Sections 1(f)(4) and 1(f)(5) provide that the term "CPI" refers to the average of the Consumer Price Index for all-urban consumers "as of the close of the 12-month period ending on August 31 of such calendar year." 6/ Thus, the CPI figure used for the base year, 1988, is the sum of the monthly CPIs for September 1987 through August 1988, divided by twelve. 26 U.S.C. 1(f)(4); 1(f)(5). Using 2003 as an example of an applicable tax year, the CPI average for tax year 2003 is the sum of the monthly CPIs for September 2001 through August 2002. (Note: the CPI figure used for a particular tax year is the average CPI ending August of the *preceding* year. 26 U.S.C. 1(f)(3)(A).) To determine the exemption amount, the resulting increased amount is rounded down to a multiple of \$50. 26 U.S.C. 1(f)(6)(A).

The calculations for the standard deduction applicable for the married filing jointly status are similar. The standard deduction is

6/ The Bureau of Labor Statistics of the U.S. Department of Labor refers to this index as the CPI-U.

determined under Code Section 63, 26 U.S.C. 63. For prosecution years 1999-2002, the unadjusted standard deduction for married filing jointly was \$5,000. 26 U.S.C. 63(b)(2)(A) (2002). For prosecution years 2003-2004, the post-CPI adjusted standard deduction for married filing jointly was double the post-CPI adjusted standard deduction for single filers (to remove the "marriage penalty"). 26 U.S.C. 63(b)(2)(A) (2004). With respect to the inflation adjustment, the CPI base year for the standard deduction is 1987. 26 U.S.C. 63(c)(4)(B). The CPI figure for 1987 is the sum of the monthly CPIs for September 1986 through August 1987, divided by twelve. Again, using 2003 as an example of an applicable tax year, the CPI average for tax year 2003 is the sum of the monthly CPIs for September 2001 through August 2002. 26 U.S.C. 1(f)(3)(A).

C. Consumer Price Index

The Consumer Price Index (CPI) is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. Each month, the Bureau of Labor Statistics (BLS), which is part of the Department of Labor, releases thousands of detailed CPI numbers to the media. Information on the CPI is available from BLS electronically, through subscriptions to publications, and via telephone and fax through automated recordings. Free and easy access to both current and historical CPI data can be found, among other places, on the BLS's website. See http://www.bls.gov/cpi/cpifaq.htm#Question_1. Using the BLS's website, see <http://data.bls.gov/cgi-bin/surveymost?cu>, government

counsel obtained the pertinent figures of the CPI, which are stated below:

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1986	109.6	109.3	108.8	108.6	108.9	109.5	109.5	109.7	110.2	110.3	110.4	110.5
1987	111.2	111.6	112.1	112.7	113.1	113.5	113.8	114.4	115.0	115.3	115.4	115.4
1988	115.7	116.0	116.5	117.1	117.5	118.0	118.5	119.0	119.8	120.2	120.3	120.5
1989	121.1	121.6	122.3	123.1	123.8	124.1	124.4	124.6	125.0	125.6	125.9	126.1
1990	127.4	128.0	128.7	128.9	129.2	129.9	130.4	131.6	132.7	133.5	133.8	133.8
1991	134.6	134.8	135.0	135.2	135.6	136.0	136.2	136.6	137.2	137.4	137.8	137.9
1992	138.1	138.6	139.3	139.5	139.7	140.2	140.5	140.9	141.3	141.8	142.0	141.9
1993	142.6	143.1	143.6	144.0	144.2	144.4	144.4	144.8	145.1	145.7	145.8	145.8
1994	146.2	146.7	147.2	147.4	147.5	148.0	148.4	149.0	149.4	149.5	149.7	149.7
1995	150.3	150.9	151.4	151.9	152.2	152.5	152.5	152.9	153.2	153.7	153.6	153.5
1996	154.4	154.9	155.7	156.3	156.6	156.7	157.0	157.3	157.8	158.3	158.6	158.6
1997	159.1	159.6	160.0	160.2	160.1	160.3	160.5	160.8	161.2	161.6	161.5	161.3
1998	161.6	161.9	162.2	162.5	162.8	163.0	163.2	163.4	163.6	164.0	164.0	163.9
1999	164.3	164.5	165.0	166.2	166.2	166.2	166.7	167.1	167.9	168.2	168.3	168.3
2000	168.8	169.8	171.2	171.3	171.5	172.4	172.8	172.8	173.7	174.0	174.1	174.0
2001	175.1	175.8	176.2	176.9	177.7	178.0	177.5	177.5	178.3	177.7	177.4	176.7
2002	177.1	177.8	178.8	179.8	179.8	179.9	180.1	180.7	181.0	181.3	181.3	180.9
2003	181.7	183.1	184.2	183.8	183.5	183.7	183.9	184.6	185.2	185.0	184.5	184.3
2004	185.2	186.2	187.4	188.0	189.1	189.7	189.4	189.5	189.9	190.9	191.0	190.3

D. Calculating the CPI averages and using tax year 2003 as an example

(I) CPI for tax year 2003

Using 2003 as an example of an applicable tax year, the CPI average for tax year 2003 is the sum of the monthly CPIs for September 2001 through August 2002, divided by twelve. That results in the following calculation: $178.3 + 177.7 + 177.4 + 176.7 + 177.1 + 177.8 + 178.8 + 179.8 + 179.8 + 179.9 + 180.1 + 180.7 = 2144.1 / 12 = 178.675$.

(ii) Base CPI for Section 151 Exemption

The base year CPI index for the Section 151 exemption, as noted, is 1988. The CPI figure for 1988 is the sum of the monthly CPIs for September 1987 through August 1988, divided by twelve. The calcula-

tion is as follows: $115.0 + 115.3 + 115.4 + 115.4 + 115.7 + 116.0 + 116.5 + 117.1 + 117.5 + 118.0 + 118.5 + 119.0 = 1399.4 / 12 = 116.616$.

(iii) *Section 151 exemption amount for tax year 2003*

The adjusted exemption for tax year 2003 is calculated as follows: $\$2,000 \times (178.675 / 116.616) = \$3,064$. Rounding that figure down to a multiple of \$50 results in an exemption for 2003 in the amount of \$3,050. That figure matches the 2003 exemption figure published by the IRS. *See. e.g*, Rev. Proc. 2002-70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns).

(iv) *Base CPI for Section 63 Standard Deduction*

The base year CPI for the Section 63 standard deduction, as noted, is 1987. The CPI figure for 1987 is the sum of the monthly CPIs for September 1986 through August 1987, divided by twelve. The calculation is as follows: $110.2 + 110.3 + 110.4 + 110.5 + 111.2 + 111.6 + 112.1 + 112.7 + 113.1 + 113.5 + 113.8 + 114.4 = 1343.8 / 12 = 111.983$.

(v) *2003 married-filing-jointly standard deduction*

Continuing with our using tax year 2003 as an example, the CPI-adjusted standard deduction for married filing jointly for tax year 2003 is calculated by first calculating the standard deduction for single filers. ^{7/} The unadjusted standard deduction for single filers is \$3,000, which is inflation adjusted by the following calculation: $\$3,000 \times (178.675 / 111.983) = \$4,786$. Rounding that figure down to a multiple

^{7/} As noted above, tax year 2003 was the first year in which the standard deduction for the married-filing-jointly status was double the standard deduction for single filers.

of \$50 results in \$4,750, which is the 2003 standard deduction for single filers. Doubling that figure results in \$9,500, which matches the 2003 joint-return standard deduction figure published by the IRS. *See, e.g.*, Rev. Proc. 2002-70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns).

(vi) *Gross income thresholds requiring the filing of a 2003 return*

Under the married filing separate status, a return is required to be filed by an individual if the gross income of that individual equals or exceeds the exemption amount. As the 2003 exemption amount is \$3,050, the married-filing-separately gross income threshold is \$3,050. That figure matches the threshold published by the IRS. *See, e.g.*, News Release, FS-2004-01, 2004 WL 25277 (gross income thresholds for 2003 returns).

Under the joint return status, a return is required to be filed if the couple's combined gross income equals or exceeds the sum of twice the exemption amount plus the basic standard deduction applicable to a joint return. 26 U.S.C. 6012(a)(1)(A)(iv). Twice the 2003 exemption amount (\$3,050) plus the 2003 joint return standard deduction (\$9,500), equals \$12,600, which matches the threshold published by the IRS. *See, e.g.*, News Release, FS-2004-01, 2004 WL 25277 (gross income thresholds for 2003 returns).

(v) *Gross income thresholds requiring the filing of a 1999-2004 return*

An individual need not, of course, personally perform these calculations each year in order to ascertain the filing threshold and the applicable standard deduction and exemption amounts. The IRS, in addition to providing these figures in the tax return instructions, also publishes these figures in Revenue Procedures and news releases: [8/]

	married filing separate	joint return
1999	\$2,750	\$12,700
2000	\$2,800	\$12,950
2001	\$2,900	\$13,400
2002	\$3,000	\$13,850
2003	\$3,050	\$15,600
2004	\$3,100	\$15,900

To avoid any confusion, we note that with respect to the married-filing-separate thresholds for 2003 and 2004, the jury instructions were \$50 off, in the defendant's favor. The instructions stated that the 2003 and 2004 thresholds were \$3,100 and \$3,150, respectively, whereas the actual thresholds were \$3,050 and \$3,100, respectively. It appears that

8/ See Rev. Proc. 98-61, 1998-2 C.B. 811, 1998 WL 869311 (cost-of-living adjustments for 1999 returns); Rev. Proc. 99-42, 1999-2 C.B. 568, 1999 WL 99370 (cost-of-living adjustments for 2000 returns); Rev. Proc. 2001-13, 2001-1 C.B. 337, 2000 WL 1874251 (cost-of-living adjustments for 2001 returns); Rev. Proc. 2001-59, 2001-2 C.B. 623, 2001 WL 1558775 (cost-of-living adjustments for 2002 returns); Rev. Proc. 2002-70, 2002-2 C.B. 845, 2002 WL 31424344 (cost-of-living adjustments for 2003 returns); Rev. Proc. 2003-85, 2003-2 C.B. 1184, 1184 WL 22718036 (cost-of-living adjustments for 2004); FS-2000-02, 2000 WL 15078 (gross income thresholds for 1999 returns); FS-2001-02, 2001 WL 7389 (gross income thresholds for 2000 returns); FS-2002-01, 2002 WL 8049 (gross income thresholds for 2001 returns); FS-2003-02, 2003 WL 23545 (gross income thresholds for 2002 returns); FS-2004-01, 2004 WL 25277 (gross income thresholds for 2003 returns); FS-2005-01, 2005 WL 11575 (gross income thresholds for 2004 returns).

the government used the 2004 figure for 2003 and the 2005 figure for 2004. Defendant was not prejudiced by this minor error, as it raised the filing requirement threshold by \$50 for those two years. (The jury instructions (8/29/06 RT 19-20) were correct with respect to the 2003 and 2004 thresholds for the married filing jointly status.)

(vi) *Defendant's gross income exceeded the threshold amounts*

The government's evidence at trial established that defendant earned gross income exceeding \$262,976 in 1999, \$313,910 in 2000, \$386,667 in 2001, \$84,010 in 2002, \$95,105 in 2003, and \$224,598 in 2004. (8/23/06 RT 149-151.) Those gross income amounts exceeded by multiples the applicable filing thresholds, whether calculated using all of defendant's income for the married filing jointly status, or using one-half of his gross income for the married filing separately status. 9/ Even if a challenge based on the difficulty of computing the thresholds was available to an individual whose gross income was close to the threshold, defendant is not such a person. *Cf. United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (“If there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns.”).

In sum, the government amply established that defendant was required to file a return.

9/ As Texas is a community property state, defendant would be taxed on one-half of his income and one-half of his spouse's income under the married filing separate status. Given defendant's substantial income, he was required to file a return for each of the prosecution years even if his wife had no gross income.

C. Defendant's argument is without merit

Defendant expends a considerable portion of his brief knocking down an argument the government does not even make. Specifically, defendant states (Def.Br. 13-14) that "[t]he 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 thus can be used to impose this duty on Clayton, and that the provisions of that booklet have the 'force and effect of law.'"

Although it is the government's position that the publication of the filing threshold amounts in the Form 1040 instruction booklet (and many other places) is relevant to whether a failure to file a return is an intentional violation of a known legal duty, it is not the government's position that the legal duty itself is imposed by the Form 1040 instruction booklet. As discussed above, the legal duty to file a return is imposed by Internal Revenue Code Section 6012, which references Code Section 63, Code Section 151, and the Consumer Price Index.

Defendant argues (Def.Br. 11) that Section 6012 does not impose a legal duty to file a tax return because it references and incorporates the Consumer Price Index, which does not "appear[] in either the Internal Revenue Code or the relevant tax regulations." 10/ But a

10/ The scope of defendant's argument is breathtaking. The use and incorporation of the Consumer Price Index as an inflation adjuster is wide-spread in the United States Code. If the United States Code's use and incorporation of the Consumer Price Index were infirm, as defen-

(continued...)

statute providing the basis for a criminal prosecution may incorporate other provisions by reference. *See United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998) (where a defendant challenged on vagueness grounds a state statute and a municipal code that incorporated federal standards by reference, the court held that "[a] statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions"). In this case, a reasonable person of ordinary intelligence, if he did not want to avail himself of the IRS documents and notices publishing the applicable filing thresholds, could have consulted the Consumer Price Index and made the necessary calculations to determine the gross income level at which he was required to file a return.

At all events, even if the incorporation of the Consumer Price Index by reference were infirm, the result would not be a negation of

¹⁰/ (...continued)
dant asserts, such an infirmity would negatively affect not only the area of tax law, but food stamps (7 U.S.C. 2014(g)(2)), military housing leases (10 U.S.C. 2828), bankruptcy law (11 U.S.C. 101), banking law (12 U.S.C. 1422), the Federal Trade Commission (15 U.S.C. 720n), the National Park Service fees (16 U.S.C. 460-d), copyright fees (17 U.S.C. 119), student loans (20 U.S.C. 1087-2), the Food, Drug and Cosmetic Act (21 U.S.C. 379g), emergency care for Native Americans (25 U.S.C. 1621a), drug benefits for Veterans (38 U.S.C. 8126), postal rates (39 U.S.C. 3622), as well as Medicare (42 U.S.C. 1395ww(h)(3)) and social security (42 U.S.C. 415(I)). *See also* 1 Guide to Employment Law and Regulation, §9:3 (1997 Ed.) ("the government uses the CPI to determine increases in Social Security benefits, to adjust tax deductions and credits, and to determine pension amounts for veterans, civil-service employees and military retirees"). As indicated above, there is no infirmity.

the legal obligation to file a tax return. Rather, under such a scenario, the CPI adjustments would be severed and the Section 6012 filing thresholds would be calculated without the CPI adjustments, for it is without question that it would be the intent of Congress that the filing threshold be calculated without a CPI adjustment as opposed to there being no filing requirement at all. *Cf. United States v. Booker*, 543 U.S. 220, 245 (2005) (severance and excise of statutory section would further Congressional intent). That would result in return-filing thresholds lower than the CPI adjusted figures. Thus, even if this Court were to hold that United States Code's incorporation of the Consumer Price Index was infirm, such a holding would not require that defendant's convictions under 26 U.S.C. 7203 be vacated. 11/

To summarize, Internal Revenue Code Section 6012 imposed on defendant the legal duty to file returns for tax years 1999, 2000, 2001, 2002, 2003 and 2004. That legal duty was not negated on the ground Section 6012 incorporates by reference the Consumer Price Index.

11/ Such a ruling would, however, wreak havoc on the lives of many millions of law abiding Americans. See note 10.

II

THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION IN INSTRUCTING THE JURY AS TO THE
FALSE RETURN COUNTS WHEN IT DECLINED TO
ALSO INSTRUCT THE JURY AS TO THE LEGAL
PRINCIPLES UNDERLYING A REFUND CLAIM

Asserting, erroneously, that the law allows him to make a claim for refund based on any legal argument, defendant argues that the District Court erred in not giving instructions that identified his theory of defense. But the District Court properly instructed the jury as to the principles of law applicable to the facts in this case.

A. Standard of Review

"A district court retains 'broad discretion' in formulating jury instructions; [this Court] will not reverse 'unless the instructions taken as a whole do not correctly reflect the issues and law.' While a defendant is entitled to an instruction on his theory of defense, he has no right to particular wording. When considering an appeal for failure to give defendant's requested defense theory instruction, [this court will] review 'whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them.'" *United States v. Simmons*, 374 F.3d 313, 3119 (5th Cir. 2004) (footnotes and citations omitted).

B. The jury was properly instructed

Defendant was charged with, among other things, two counts of filing a false income tax return, in violation 26 U.S.C. 7206(1). Section 7206(1) provides, in pertinent part, that any person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony." 26 U.S.C. 7206(1).

Count one of the indictment charged that defendant "did willfully make and subscribe an Amended U.S. Individual Income Tax Return, Form 1040X, for the calendar year 1997, which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service in Austin, Texas, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported adjusted gross income of \$0 on line 1, column C, and claimed a refund of \$83,296 on line 23, whereas, the defendant then and there well knew and believed, he had received substantial income in that calendar year and was not due a refund." Count two contained similar allegations with respect to defendant's filing a false 1998 Form 1040X.

Defendant (Def.Br. 31) states that his theory of defense at trial was that the Forms 1040X "were not false returns, but instead were claims for refunds." He contends (Def.Br. 49) that the law allows him

to "make a claim for refund based on any legal argument" and that if he "was making a claim for refund of taxes previously paid[,] [he] could not be charged for filing false returns." With his theory of defense so framed, defendant argues (Def.Br. 35-36) that it was reversible error for the District Court not to give two jury instructions, one instructing that a refund of taxes "is accomplished by filing a Form 1040X," and the other instructing that "[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" and that "[a]nything not raised in the claim cannot be raised later in a suit for a refund." There was no error, much less reversible error.

It is true that a Form 1040X is the appropriate tax form on which to claim a refund of income taxes. *See* 26 CFR 301.6402-3(a)(3). But the Form 1040X, as its caption indicates, is fundamentally an "Amended U.S. Individual Income Tax Return." The Form 1040X is used to report all changes or corrections to a filed Form 1040. That is, the form is used not only to report changes that result in a tax liability lower than initially reported, but it is also the proper form to report amendments that result in a higher tax liability. A Form 1040X thus is used not only to report changes that underlie a claim for the refund of tax, but also to report changes that underlie the payment of additional tax. That a Form 1040X contains a claim for the refund of tax, as opposed to a payment of additional tax, does not negate its status as a return that amends the originally filed return. Accordingly, the filing of a willfully

false Form 1040X is within the purview of 26 U.S.C. 7206(1). *United States v. Damon*, 676 F.2d 1060, 1063-64 (5th Cir. 1982) (holding that a false Schedule C is part of a return and is within the purview of § 7206(1) and rejecting the defendant's argument that a Schedule C is not within the purview of the statute because it is not specifically and explicitly required by statute or regulation); *United States v. Taylor*, 574 F.2d 232, 237 (5th Cir. 1978) (same holding as to Schedules E and F). *Cf. United States v. Levy*, 533 F.2d 969, 975 (5th Cir. 1976) (holding that the term "statement" in § 7206(1) would be construed to refer to documents required by statute or regulation).

Asserting that the law allows him to "make a claim for refund based on any legal argument," defendant argues that the jury should have been instructed that any issue not raised in an administrative claim cannot be raised later in a refund suit filed in district court. Defendant contends (Def.Br. 51) that if the proffered instructions had been given, the jury might have concluded that his Forms 1040X "were not false returns, but in fact were valid and legal claims for refunds."

The principle infirmity with defendant's position is his contention that the law allows him to "make a claim for refund based on any legal argument." The filing of a false claim for the refund of taxes is a crime. ^{12/} *See United States v. Simkanin*, 420 F.3d 397, 401-402 (5th

^{12/} Defendant cites (Def.Br. 47-48) to cases where a meritless refund claim was the subject of a civil suit. Those cases do not support defendant's position that he can not be criminally prosecuted for willfully filing a false refund claim.

Cir. 2005) (defendant convicted of knowingly making and presenting false claims for refund of employment taxes, in violation of 18 U.S.C. 287 and 2); *United States v. Foster*, 229 F.3d 1196, 1196 (5th Cir. 2000) (defendant convicted of presenting false, fictitious and fraudulent claims to the government, in violation of 18 U.S.C. 287 and 2); *United States v. Garcia*, 903 F.2d 1022, 1023 (5th Cir. 1990) (defendant convicted of filing a false claim for a federal income tax refund, in violation of 18 U.S.C. 287); *United States v. Martin*, 790 F.2d 1215 (5th Cir. 1986) (defendant convicted of conspiracy to aid and assist in the preparation of false tax returns and false tax refund claims, in violation of 18 U.S.C. 371 and 287 and 26 U.S.C. 7206(2), 104 counts of aiding in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2); and 15 counts of submitting false amended returns to secure refunds, in violation of 18 U.S.C. 287 and 2).

United States v. Ambort, 405 F.3d 1109 (10th Cir. 2005), is instructive on this point. In *Ambort*, the defendant advised customers that "only non-white residents of the territorial United States were actually 'residents' for income tax purposes" and that "they could use IRS Form 1040X to file a corrected return for the previous three tax years, and obtain a full refund of any taxes paid or withheld for that period." 405 F.3d at 1113. The defendant was convicted on one count of conspiracy to defraud the United States by assisting in the preparation of false tax returns, in violation of 18 U.S.C. 371, and multiple

counts of aiding and assisting in the preparation of false federal tax returns, in violation of 26 U.S.C. 7206(2). 405 F.2d at 1112.

On appeal, the defendant contended that he had "a good faith belief that he was pursuing the proper procedure to attempt to change [the] law." 405 F.2d at 1114. Specifically, the defendant contended that he was merely advising the customers to follow the established refund procedures: pay the tax, file a refund claim, and then challenge the denial in court. 405 F.3d at 1114. He argued that his conduct was not criminal because Section 7206 did not "reach differences in legal positions" and "because the tax returns in question were accompanied by correct information." 405 F.3d at 1116-17.

The Tenth Circuit had no difficulty rejecting those arguments, holding that neither the tax refund procedures nor the right to petition the government immunized a defendant from prosecution for filing willfully false claims for refund of taxes. 405 F.3d at 1116-17; *see also Bill Johnson's Restaurant's, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (baseless claims are not immunized by the First Amendment right to petition). The court also judged it "irrelevant that the returns may have also included information from which the IRS could, and in fact did, determine that the representation of residency status was false," holding that "[t]he fact that the scheme ultimately failed to fool the IRS does not vitiate the fraudulent nature of the scheme." 405 F.3d at 1117.

C. Defendant's argument is without merit

The jury charge in the present case instructed the jurors as to the principles of law applicable to the factual issues in this false return case. *See United States v. Simmons*, 374 F.3d 313, 319 (5th Cir. 2004). In contradistinction, the instructions proffered by defendant, although a correct statement of the legal principles underlying an administrative refund claim and refund suit, were not applicable to the factual issues in this case. That conclusion is buttressed by the fact that the legal theory that allegedly made the proffered instructions relevant to the facts -- that defendant can, with impunity, "make a claim for refund based on any legal argument" -- is not the law; the filing of a false claim for the refund of taxes is a crime, as we have shown above.

III

SUFFICIENT EVIDENCE SUPPORTED DEFENDANT'S
CONVICTIONS ON THE FALSE RETURN COUNTS

There was, contrary to defendant's position, ample evidence that defendant filed false amended returns and that he did so willfully.

A. Standard of Review

Defendant challenges the sufficiency of the evidence to uphold his convictions for filing false returns. "The sufficiency of the evidence is reviewed to determine whether any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Because [defendant] properly preserved this issue by moving for a judgment of acquittal at the close of the Government's case and at the close of all evidence, this issue is reviewed *de novo*. In evaluating the

sufficiency of the evidence, [the Court] view[s] all evidence and all reasonable inferences drawn from it in the light most favorable to the Government. Review of the sufficiency does not include review of the weight of the evidence or of the credibility of the witnesses." *United States v. Penaloza-Duarte*, 473 F.3d 575, 579 (5th Cir. 2006).

B. Defendant filed false amended returns and did so willfully

Defendant argues (Def.Br. 51) that there was insufficient evidence that he willfully filed a false return, arguing that the Forms 1040X "were not false returns," but "valid and legal claims for refunds," and that he "filed those amended returns so that he could pursue a claim for refund in the U.S. district court."

Defendant filed a Form 1040X, Amended U.S. Individual Income Tax Return, for 1997, on which defendant reported his adjusted gross income was not \$246,979, as he had correctly reported on the original return, but \$0. Defendant then filed a Form 1040X, Amended U.S. Individual Income Tax Return, for 1998, on which defendant reported that his adjusted gross income was not \$243,919 as he had correctly reported on the original return, but \$0. In support of his position that his income was zero, defendant asserted that, under 26 U.S.C. 861, the compensation he received as a radiologist is not taxable. That position is not only legally incorrect, it is "absurd" and "patently frivolous." *See Rayner v. Commissioner*, No. 02-60565, 2003 WL 21545925 (5th Cir. July 3, 2003) ("Rayner insists that he owed no tax in 1998 because all his income that year -- namely, \$217,331 in distributions from various

retirement funds and \$920 in nonemployee compensation -- derived from sources within the United States and therefore (so he says) is not taxable income under 26 U.S.C. 861 and the regulations construing that statute. This absurd argument is patently frivolous." 13/ There is no bona fide dispute that defendant filed false amended returns.

With respect to the element of willfulness, we note that, in determining whether defendant subjectively knew what the law required, one of the things the jury could consider was the unreasonableness of his asserted belief (as the jury was correctly instructed). (8/29/06 RT 17.) *See Cheek v. United States*, 498 U.S. 192, 203-04 (1991) ("Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge."). Even ignoring all of the government's other evidence, the jury was entitled to conclude that defendant did not actually believe the "absurd" and "patently frivolous" Section 861 argument. *Cf. Rayner, supra*.

The jury, though, had plenty of additional evidence on which to ground its verdict. For example, as early as June 2000, defendant, in an email to Larken Rose, began constructing a putative defense to a possible criminal prosecution against him. (Govt.Ex. 208.) The jury

13/ Unpublished opinions issued on or after January 1, 1996, are not precedent, but may be cited if a reference to publicly accessible electronic database is included. 5th Cir. Local Rule 47.5.

was entitled to conclude that defendant's planning of a defense to a future criminal prosecution was inconsistent with a bona fide belief that his income was not taxable. Also, between himself and Larken Rose, defendant admitted that "[s]ometimes (most of the time) I am so full of [expletive] it amazes me." (Govt.Ex. 280; 8/28/06 RT 89.) The jury was entitled to reject defendant's self-serving trial testimony and conclude that defendant meant just what he said in that email.

CONCLUSION

For the reasons stated, this Court should affirm the judgment.

Respectfully submitted,

EILEEN J. O'CONNOR
Assistant Attorney General

ALAN HECHTKOPF (202) 514-5396
S. ROBERT LYONS (202) 307-6512
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

Johnny K. Sutton
United States Attorney

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,232 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 32-4, and has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Century Schoolbook type style.

Attorney for United States
Dated: April 9, 2007

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing brief has been made on counsel for defendant on this 9th day of April, 2007, by emailing a PDF copy to him, and by mailing of two paper copies in an envelope, properly addressed as follows:

Lowell H. Becraft, Jr., Esq.
209 Lincoln Street
Huntsville, Alabama 35801

S. ROBERT LYONS
Attorney