

CTJ w/o

orig

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION
JAN 7 2009

UNITED STATES OF AMERICA

§
§
§
§
§

v.

CRIMINAL NO. 4:03-188-A

RICHARD MICHAEL SIMKANIN

**DEFENDANT’S MOTION FOR RECONSIDERATION AND
REQUEST FOR (1) PATTERN JURY INSTRUCTION
REGARDING MISTAKE, IGNORANCE, NEGLIGENCE
OR GROSS NEGLIGENCE AND (2) GOOD FAITH INSTRUCTION
UNDER CHEEK V. U.S., 498 U.S. 192 (1991)**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant RICHARD MICHAEL SIMKANIN, (“Simkanin”) by and through his attorney of record, Arch C. McColl, III, and moves the Court for reconsideration of the denial of the request for the above 2 items in the instruction to the jury and for cause would show as follows:

1. **Jury has now specifically focused on willfulness** - By the jury sending a note out asking for the definition of “willfulness” and by the Court, in an instruction answering that note, not including a complete definition under the Fifth Circuit Pattern Jury Instructions which states that willfulness does not include acting out of “mistake, ignorance, negligence or gross negligence,” the Court is giving an incomplete statement of the law and therefore an inaccurate statement of the law to the jurors just as it did in the original jury instructions which the Court read orally to the jury to which the Defendant objected for this same reason, among others. This inaccurate statement of the law denies the Defendant a fair trial under the Sixth Amendment and denies him Due Process under the Fifth Amendment.

2. **Request for good faith instruction** - The Defendant asks the Court to

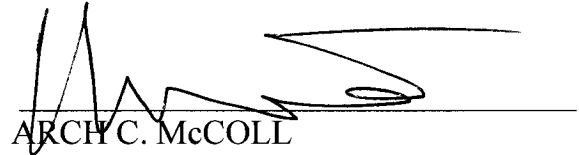
reconsider its earlier denial of the Defendant's objection to the charge orally read to the jury based on *Cheek v. U.S.*, 498 U.S. 192 (1991), and the Defendant's request for an instruction on "good faith." The failure to provide a definition of good faith, now that the jury has specifically asked for the definition of willfulness, indicates to the jury that there is no such defense as good faith to this charge. The Court has made it clear that the argument of lawyers is not the law and that the only law in this case is given by the Court. Therefore, by omission, this instruction in answer to jury note number one is an inaccurate statement of the law given to the jury in specific response to their note and it deprives the jury of making an informed decision based on the defense of a good faith misunderstanding of the law.

3. **Denial of Fifth and Sixth Amendment Right** - The failure to include an instruction on the defense of a good faith misunderstanding of the law under *Cheek v. U.S.*, *supra*, now that the jury has specifically focused on willfulness, is a denial of the Defendant's Sixth Amendment right to a fair trial and his Fifth Amendment right of Due Process.

4. **Sixth Amendment right to effective counsel** - By not giving the instructions that the defense counsel argued, the jury is given the distinct impression that what defense counsel was arguing was not the law, thereby feeling free to ignore defense counsel's arguments and denying the Defendant effective assistance of counsel under the Sixth Amendment. This is applicable to both the Pattern Jury Instructions requested and the request for the good faith defense under *Cheek v. U.S.*, *supra*, which notes that even an "irrational" belief may be a basis for a complete good faith defense.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that these two requests be granted in the interest of justice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arch C. McColl', is written over a horizontal line. The signature is stylized with several loops and a long horizontal stroke at the end.

ARCH C. McCOLL

State Bar Number: 13431800

McCull & McCulloch

2000 Thanksgiving Tower

1601 Elm Street

Dallas, Texas 75201

(214) 979-0999

(214) 979-9090 Facsimile

CERTIFICATE OF SERVICE

I, ARCH C. McCOLL, III do hereby certify that on the 7th day of January, 2004, a true and correct copy of the Defendant's Motion for Reconsideration and Request for (1) Pattern Jury Instruction Regarding Mistake, Ignorance, Negligence or Gross Negligence and (2) Good Faith Instruction Under *Cheek v. U.S.*, 498 U.S. 192 (1991) has been sent via facsimile, 817-978-3094, and U.S. Mail to David Jarvis, Assistant U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza, Ste. 1700, 801 Cherry Street, Fort Worth, Texas 76102-6882.



ARCH C. McCOLL, III

CERTIFICATE OF CONFERENCE

I, ARCH C. McCOLL, III, do hereby certify that on the 7th day of January, 2004, I was unable to communicate with David Jarvis, the Assistant U.S. Attorney for the Northern District of Texas, Fort Worth Division, Defendant's Motion for Reconsideration and Request for (1) Pattern Jury Instruction Regarding Mistake, Ignorance, Negligence or Gross Negligence and (2) Good Faith Instruction Under *Cheek v. U.S.*, 498 U.S. 192 (1991).



ARCH C. McCOLL, III