

CRIMINAL

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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
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CLERK OF COURT

UNITED STATES OF AMERICA

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v.

CRIMINAL NO. 4:03-188-A

RICHARD MICHAEL SIMKANIN

**DEFENDANT’S MOTION AND MEMORANDUM
REGARDING CITATION FOR “MISTAKE, NEGLIGENCE, ETC.”**

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 submits the following authority for the Defendant’s citation for “Mistake, Negligence, Etc., and requests that it be given to the jury for the following reasons:

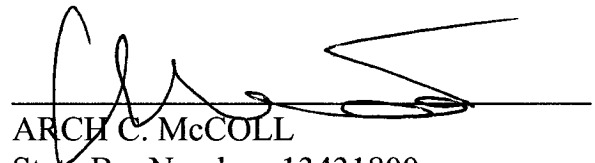
1. **Citations** - In *U.S. v. Garcia*, 762 F.2d 1222 (5th Cir. 1985), the Court used the instruction to the jury that conduct done by “mistake, negligence, or gross negligence” could not be a basis for a conviction. In *Cheek v. U.S.*, 498 U.S. 192 (1991), the **complete** sentence is that the offense requires the complete phrase, that the defendant can be convicted for violation of the law in a criminal tax case for “a violation of a known duty, **a burden that cannot be proved by mistake, ignorance or negligence.**” The highlighted and emphasized part of the preceding quotation was omitted from the Court’s instruction to the jury and therefore is an incomplete statement of the law as enunciated by the United States Supreme Court by *Cheek*. Violation of the Sixth and Fifth Amendment by omitting the balance of the

sentence quoted above from the jury instructions, the Court has violated the Defendant's right to a fair trial under the Sixth Amendment and the Defendant's right to Due Process under the Fifth Amendment.

2. **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 the above requested instructions.

WHEREFORE PREMISES CONSIDERED, the Defendant requests that the above highlighted phrase regarding mistake, ignorance and negligence, be given to the jury.

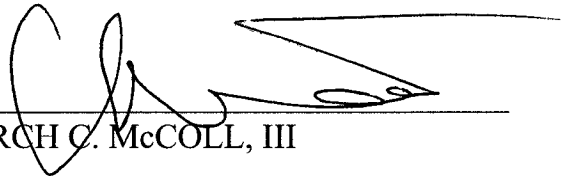
Respectfully submitted,



ARCH C. McCOLL
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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 and Memorandum Regarding Citation for "Mistake, Negligence, Etc.," 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 and Memorandum Regarding Citation for "Mistake, Negligence, Etc."



ARCH C. McCOLL, III