ORIGINAL

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

UNITED STATES OF AMERICA	§	
	§	
v.	§	NO. 4:03-CR-188-A
	§	
RICHARD MICHAEL SIMKANIN	§	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT SIMKANIN'S MOTION FOR A NEW TRIAL

The United States, by and through the undersigned and, hereby responds in opposition to Defendant Simkanin's Motion for a New Trial. 1/

As grounds for a new trial, defendant alleges that he was deprived "of his Sixth Amendment right to present evidence, his Sixth Amendment right to a fair trial, his Sixth Amendment right to effective counsel and his Fifth Amendment right to Due Process." (Def. Motion. 1-2.) Specifically, defendant asserts that: (1) the Court made an incorrect statement of the law in the presence of the jury; namely, "that the Social Security system was a mandatory participation system" (Def. Motion 1); (2) the Court erred in excluding certain defense exhibits (Def. Motion 1); and (3) the Court erred in "restrict[ing] the evidence of various Internal Revenue Code definitions such as 'income,' 'employee,'

1/ The United States construes defendant's motion for a new trial as being brought under Rule 33(a) of the Federal Rules of Criminal Procedure, which provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." *See* Fed. R. Crim. P. 33(a).

'taxpayer,' etc." (Def. Motion 2.) Defendant argues that these alleged errors "undercut [his] ability ... to prove his good faith basis for his actions and for his belief." (Def. Motion 2.)

In *United States v. Barnett*, 945 F.2d 1296 (5th Cir. 1991), the Fifth Circuit addressed several of the arguments raised by defendant Simkanin. In *Barnett*, the defendant was "a tax protestor who claim[ed] he was not required to file federal income tax returns because (i) wages are not income under the tax laws" and "(ii) filing a tax return is voluntary and the Internal Revenue Service (IRS) will file a return on behalf of any taxpayer who chooses not to file." 945 F.2d at 1298. Among other things, the defendant "challenge[d] the trial court's instructions regarding a taxpayer's duty to file a return." 945 F.2d at 1299. During the government's case-in-chief, "defense counsel asked the government's summary IRS witness whether he was familiar with IRC section 6020(b) or any other provision in the IRC which provided that the IRS would file a tax return on behalf of the taxpayer." 945 F.2d at 1300. Immediately prior to the defendant testifying, the District Judge advised the jury that the IRS was not under a duty to prepare a taxpayer's return, under section 6020(b) or any other provision. 945 F.2d at 1300.

On appeal, the defendant did "not challenge the legal accuracy of this instruction," but he did "complain that the instruction, made immediately before he was to testify as to his beliefs about the tax laws, undermined his testimony and implied to the jury he had no reasonable grounds for his beliefs." 945 F.2d at 1300. The Fifth Circuit rejected that

contention, stating that "[t]he jury must know the law as it actually is respecting a taxpayer's duty to file before it can determine the guilt or innocence of the accused for failing to file as required." 945 F.2d at 1300. The Court held that because "[d]efense counsel raised the inference that the IRS actually has some statutory duty to file returns for delinquent taxpayers such as might relieve those taxpayers from the duty to file themselves," "the trial court "needed to instruct the jury on the state of the law." 945 F.2d at 1300.

The defendant in *Barnett* also "contend[ed] that the trial court erred in excluding from evidence several items of documentary evidence relating to taxation laws that he tendered. He claim[ed] that such evidence would have bolstered the legitimacy of the claim that he sincerely believed that he did not have to file tax returns." 945 F.2d at 1301. The excluded documents were two volumes of the Internal Revenue Code, a copy of the U.S. Constitution, a copy of the Privacy Act, a copy of Black's Law Dictionary definition of "income," a copy of the Texas State Constitution, a book entitled *Are You Required*, a book entitled *How Anyone Can Stop Paying Income Taxes*, and an IRS publication entitled *Handbook for Special Agents*. 945 F.2d at 1301 n.2.

The Fifth Circuit held that "[t]he law applicable to this issue was established in this Circuit in *United States v. Flitcraft*, 803 F.2d 184 (5th Cir. 1986)," which "recognized both the need to allow the defendant to establish his beliefs through reference to tax law sources and the need to avoid unnecessarily confusing the jury as to the actual state of the

law. The *Flitcraft* court found the delicate balancing required by Rule 403 of the Federal Rules of Evidence to have been satisfied by excluding the documents themselves but allowing the defendant to testify as to their contents and effect in forming his beliefs. *Flitcraft*, 803 F.2d at 185-86. In allowing such testimony, the documents themselves become cumulative and the potential for jury confusion is minimized." 945 F.2d at 1301. The *Barnett* Court concluded that "trial court appropriately applied the *Flitcraft* standard. While not allowing the documents themselves to go to the jury, the court allowed Barnett, during his testimony, to make references to these documents as the sources of his beliefs." 945 F.2d at 1301.

Addressing the trial court's refusal to allow the defendant to read the front of the IRS Special Agent's Handbook, the Fifth Circuit opined that "[a]t one point in Barnett's testimony, the trial court may have gone further than necessary in excluding Barnett's documentary evidence." 945 F.2d at 1301 n.3. The Court stated that "[w]hile the voluminous 'cover the waterfront' exhibits that Barnett originally offered into evidence posed a real danger of confusing the jury and inviting them to instruct themselves on the presently applicable law by their extraction of it from this undifferentiated mass of material, most of which was entirely irrelevant, nevertheless Barnett's limited and specific offer of one or two sentences from the IRS Special Agent's Handbook would have posed the same threat." 945 F.2d at 1301 n.3. The Court ruled, though, that "if the exclusion of this item were error, it is clear to use that it was harmless error and did not affect Barnett's

substantial rights." 945 F.2d at 1301 n.3.

The Fifth Circuit also held there was no error "in the exclusion by the trial court of hearsay testimony regarding the content of several tax seminars that Barnett attended. At several times, Barnett began to testify as to what a lecturer had said in a seminar. The prosecution's hearsay objections to this testimony were sustained by the court; alternatively, the court instructed defense counsel that he could ask Barnett what was said at such seminars and offer it for the limited purpose of showing such statements were made and the effect they had on Barnett's beliefs." 945 F.2d at 1301-02. Thus, the Fifth Circuit held, contrary to the defendant's contention, his "testimony was not, in fact, improperly limited at all." 945 F.2d at 1301-02.

The teachings of *Barnett* are instructive here. There was no error in the Court's preclusion of the referenced documents; defendant Simkanin was not precluded from testifying as to their contents and their effect in forming his beliefs. Even if defendant could cite an example where a limited portion of a particular document might have been admitted under a Rule 403 balancing test, such exclusion would be harmless error not affecting defendant's substantial rights. There was no error in the Court's restricting defense counsel's attempt to elicit testimony as to the legal definitions of "income," "employee," and "taxpayer." It is the Court's position to instruct the jury as to the law; further, defendant was not precluded from testifying as to his understanding of those terms and how his understanding of those terms supported his good faith defense.

In contending that the Court made an incorrect statement of the law in the presence of the jury -- "that the Social Security system was a mandatory participation system" -- defense counsel crosses into frivolous and potentially sanctionable argument. Instead of limiting himself to the position that the Court erred in excluding the referenced documents, defense counsel purports to "incorporate[] by reference all of the legal argument" contained in the documents. (Def. Motion 2.) Defense counsel thus argues that defendant is entitled to a new trial on the grounds that: (1) participation in the Social Security system is voluntary; and (2) because participation in the Social Security system is voluntary, defendant was not required to withhold FICA and income taxes from the wages of Arrow's employees.

The government detailed in previous memoranda the statutory basis for Arrow's obligation to withhold FICA and income taxes from the wages of Arrow's employees. We also detailed in that memoranda the statutory basis for defendant's liability under Internal Revenue Code Section 7202. Defendant does not, in the present motion, directly challenge the correctness of those statements of law; rather, he mounts a collateral challenge by arguing that participation in Social Security is voluntary. But, as explained below, participation in Social Security is not voluntary for employees, and defendant's argument to the contrary is frivolous.

"The Social Security Act of 1935, ... established an insurance program for 'persons working in industry and commerce as a long-run safeguard against the occurrence of old-

age dependency." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 43 (1986) (citations omitted). "From that relatively humble beginning, the coverage of the Act has been expanded to provide benefits not only to the 'insured worker in his old age,' [citation omitted], but also to 'individuals and families when workers retire, become disabled, or die.'" *Id.* "The 'basic idea' of Social Security 'is that, while they are working, employees and their employers pay earmarked social security contributions (FICA taxes)... Then, when earnings stop, or are reduced because of retirement in old-age, death, or disability, cash benefits are paid to partially replace the earnings that were lost.'" *Id.* at 43-44.

"As of 1983, more than 90% of the Nation's paid employees, a total of more than 115 million people, participated in the Social Security System." *Id.* at 44. "'The ten percent of workers not ... covered by social security [in 1983] include[d] most Federal civilian workers (2.4 out of 2.7 million], about 30 percent of State and local employees (approximately 3 million), and 10-15 percent of employees of nonprofit organizations (up to 1 million).'" *Id.* at 44 n.3.

"Participation in the System is, and has been since its inception, 'basically mandatory.'" *Id.* "Therefore, most workers covered by the System and their employers have no choice whether or not to participate." *Id.* "In 1935, when the Act was adopted, Congress faced questions as to whether it could compel the States and their political subdivisions to include their employees in the System." *Id.* "Therefore, the Act at that

time excluded such employees from its coverage." *Id.* at 44. "Responding to subsequent pressure from States that sought Social Security coverage for their employees, in 1950 Congress enacted [42 U.S.C.] § 418." *Id.* at 44-45. In enacting Section 418, Congress "authorize[d] voluntary participation by States in the Social Security System." *Id.* at 45. "From its enactment in 1950 through 1983, § 418 permitted States to terminate their § 418 Agreements '[u]pon giving at least two years' advance notice in writing to the [Secretary[.'" *Id.*

"Starting in 1976," "the 'numbers of [workers] being terminated from coverage' began to exceed the numbers of newly covered [workers].'" *Id.* at 46. "After studying the trend towards termination of § 418 Agreements and the reasons for it, Congress determined that the increasing rate of withdrawals was threatening the integrity of the System." *Id.* at 46-47. Among other things, "'the shifting of the tax burden of social security from those workers who withdraw, but who remain entitled to future benefits based on their past earnings,' created resentment on the part of workers whose participation in the System was mandatory." *Id.* at 47. Also, "Congress regarded voluntary participation by some employees, such as those of state and local governments, as an anomaly in an otherwise mandatory program." *Id.* at 47 n.11. Accordingly, in 1982 and 1983, Congress passed legislation making participation in Social Security and Medicare mandatory for all workers.2/ *See e.g., United States v. Hatter*, 532 U.S. 557

2/ The legislation contained transition rules that are not applicable here.

(2001) (discussing changes and holding that certain rules with retroactive effect could not be applied to sitting federal judges); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 43 (1986) (discussing changes and holding that Congress had the authority to amend the law and require mandatory participation for State employees).

Internal Revenue Code Section 6109(a) provides that "[w]hen required by regulations prescribed by the Secretary" "[a]ny person required under the authority of this title to make a return, statement, or other document shall include in such return, statement, or other document such identifying number as may be prescribed for securing proper identification of such person." Code Section 6109(d) provides that "[t]he social security account number issued to an individual for purposes of section 205(c)(3)(A) of the Social Security Act shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title."3/ Treasury Regulation § 31.6011(b)-2(a)(ii) specifically provides that "every employee" who is "subject to the taxes imposed by the Federal Insurance Contributions Act or which are subject to the withholding of income tax from wages under section 3402"

3/ Under the regulations, an individual who is required to furnish a Taxpayer Identification Number must use his or her social security number unless the individual is not eligible to obtain a social security number. *See* 26 C.F.R. § 301.6109-1(a)(1)(ii)(A)-(B). Citizens of the United States are eligible to obtain Social Security numbers. *See* 20 C.F.R. §§ 422.104(a)(1), 422.107. The regulations additionally provide that "'[a]ny individual who is duly assigned a social security number or who is entitled to a social security number will not be issued an IRS individual taxpayer identification number.'" 26 C.F.R. § 301.6109-1(d)(4).

is required to have a Social Security number. *See Damron v. Yellow Freight System, Inc.*, 18 F. Supp.2d 812, 819-820 (E.D. Tenn. 1998). Similarly, Treasury Regulation 31.6011(b)-2(c) requires an employer to include the employee's social security number in all records, returns, statements and documents of the employee.

In sum, the Social Security system is mandatory for employees, and defendant's contention that the Court erred in stating "that the Social Security system was a mandatory participation system" is without merit. 4/

The exhibits attached to defendant's motion do not bolster his request for a new trial. Indeed, the defendant's references to isolated statements from various documents are taken completely out of context within the document. Such misleading references demonstrate an obviously desperate and feeble attempt to bolster the defendant's frivolous

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4/ In addition to making the legally frivolous argument that participation in Social Security by employees is voluntary, defendant makes additional frivolous and potentially sanctionable arguments. Defendant contends, for example, that the jurisdiction of the federal government is limited to the "U.S. territories and possessions of the District of Columbia, Puerto Rico, the Virgin Islands, Guam and American Samoa," citing Internal Revenue Code Section 3121(e). (Defendant Motion at 3). Internal Revenue Code Section 3121(e)(1) states that "[t]he term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa. Code Section 3121(e)(2) provides that "[]the term 'United States' when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa." Code Section 7701(c) provides that "[t]he terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. 7701(c). Thus, the fact that the Code defined the term "United States" as specifically including the District of Columbia and the other territories does not exclude the fifty States, as the common understanding of the term "United States" includes the fifty States. *See United States v. Ward*, 833 F.2d 1538, 1538 (11th Cir. 1987).

arguments. Several of these exhibits which indicate "Social Security is a voluntary system in that no one is required to get a number," *see e.g.*, Defendant's Exhibit 1, typically follow-up that statement with one indicating that Internal Revenue Code requires employees to obtain a social security number for tax purposes. One attachment even makes clear that the Social Security system is voluntary only in the sense that the Social Security Act does not "require an SSN simply for the purpose of having one," but employees and those who seek benefits under the system are required to obtain a obtain a social security number. *See* Defendant's Exhibit 6.

It is also important to note that the defendant incorrectly substituted the word "employee" for the word "employer" when quoting from Defendant's Exhibit 7. The attached letter, authored by a Social Insurance Specialist with the Social Security Administration, states that "[w]e are not aware of any Federal law or regulation that requires an *employer* to obtain a Social Security number before hiring an employee or for employment purposes."5/ (Emphasis supplied.) In his motion, defendant alters the sentence to read: "We are not aware of any Federal law or regulation that requires an *employee* to obtain a Social Security number before hiring an employee or for employment purposes." (Emphasis supplied.)

The defendant also complains that the GAO Report (Def. Mtn. 6) should have been admitted into evidence. The GAO Report dealt with public governmental employees,

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5/ Corporations are issued Taxpayer Identification Numbers, not social security numbers.

unlike Arrow which was a private employer. Moreover, the first paragraph of the report (underlined by the defendant in Def. Exhibit 9) refers to **1981** as the time when these public employees withdrew from Social Security. As noted in the footnote on the same page of the report, such withdrawal was only permitted before the Social Security Act was amended in 1983. Moreover, as explained on pages 7-9 of this response, the law was changed in 1982 and 1983 making participation in Social Security and Medicare mandatory for all workers. This report deals with matters clearly factually distinguishable from the instant case. As such, the attempt to admit this exhibit into evidence was yet another example of the defendant's attempts to confuse the jury with evidence completely irrelevant to the factual issues before the jury.

Defendant's motion for a new trial, like his asserted good faith defense, is without merit. The United States requests that the Court deny defendant's motion for a new trial.

Respectfully submitted,

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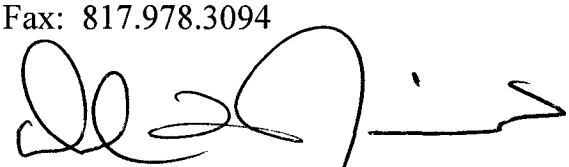

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CERTIFICATE OF SERVICE

This is to certify that on this the 22nd day of January, 2004, a true and correct copy of the foregoing Government's legal memorandum was served via facsimile and via the United States Postal Service or Federal Express on Arch McColl, III, 1601 Elm Street, Suite 2000, Dallas, Texas 75201-4761, attorney for defendant Simkanin.

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