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

UNITED STATES OF AMERICA . CRIMINAL ACTION NO.
. 4:03-CR-188-A
VS. .
. .
RICHARD MICHAEL SIMKANIN . January 5, 2004
. 12:25 p.m.
.

VOLUME II
TRIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN H. McBRYDE
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Fort Worth, Texas 76102-3637
(817) 850-6661

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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I N D E X

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GOVERNMENT'S DIRECT EVIDENCE

3

	Direct	Cross	Redirect	Recross	Voir Dire	Court
4	WITNESSES:					
	Dianne Clemonds	30	49			
5	James Kelly	52			56	
		57	73			
6	Fred Taylor	90	97			
	Al Sharp	102	109			
7	Robert Dean	110	116			
	Joe Cooper	119	126			
8	Randy Perdue	144	147			
	Louis Morris	148	152			
9	Phillip Eastman	156	164			
	Ron Wright	166	172			
10	Allan McGowan	174	178			

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	No.	Description	Offered	Admitted
13	GX-1	Secretary of State Records, Arrow Custom Plastics	176	176
14	GX-2	Secretary of State Records, Simkanin, Inc.	176	176
15	GX-3	Letter From Simpson & Taylor, 3-28-2000	96	96
16	GX-4	Form 1120 Tax Return	60	61
	GX-5	Form 1120 Tax Return	60	61
17	GX-6	Form 1120 Tax Return	60	61
	GX-7	Form 1120 Tax Return	60	61
18	GX-8	Form 1120 Tax Return	60	61
	GX-9	Form 1120 Tax Return	60	61
19	GX-10	Individual Tax Return, 1993	65	65
	GX-11	Individual Tax Return, 1994	65	65
20	GX-12	Individual Tax Return, 1995	65	65
	GX-13	Fax, From James Kelly to Richard Simkanin, 11-5-99	70	70
21	GX-14	Summary Wage Data, 1995 - 2001	104	104
22	GX-15	Employee Wages, 3rd Qtr. 1999	104	104
	GX-16	Supporting Documents, 3rd Qtr. 1999	104	104
23	GX-17	Employee Wages, 4th Qtr. 1999	104	104
	GX-18	Supporting Documents, 4th Qtr. 1999	104	104
24	GX-19	Employee Wages, 1st Qtr. 2000	104	104
	GX-20	Supporting Documents, 1st Qtr. 2000	104	104
25	GX-21	Employee Wages, 2nd Qtr. 2000	104	104
	GX-22	Supporting Documents, 2nd Qtr. 2000	104	104

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3	No.	Description	Offered	Admitted
	GX-23	Employee Wages, 3rd Qtr. 2000	104	104
4	GX-24	Supporting Documents, 3rd Qtr. 2000	104	104
	GX-25	Employee Wages, 4th Qtr. 2000	104	104
5	GX-26	Supporting Documents, 4th Qtr. 2000	104	104
	GX-27	Employee Wages, 1st Qtr. 2001	104	104
6	GX-28	Supporting Documents, 1st Qtr. 2001	104	104
	GX-29	Employee Wages, Mid 2nd Qtr. 2001	104	104
7	GX-30	Supporting Documents, Mid 2nd Qtr. 2001	104	104
8	GX-31	Summary Wage Data, Richard M. Simkanin, Mid 2nd Qtr. 2001 through 3rd Qtr. 2003	104	104
9	GX-32	Employee Wages, Mid 2nd Qtr. 2001	104	104
10	GX-33	Supporting Documents, Mid 2nd Qtr. 2001	104	104
11	GX-34	Employee Wages, 3rd Qtr. 2001	104	104
	GX-35	Supporting Documents, 3rd Qtr. 2001	104	104
12	GX-36	Employee Wages, 4th Qtr. 2001	104	104
	GX-37	Supporting Documents, 4th Qtr. 2001	104	104
13	GX-38	Employee Wages, 1st Qtr. 2002	104	104
	GX-39	Supporting Documents, 1st Qtr. 2002	104	104
14	GX-40	Employee Wages, 2nd Qtr. 2002	104	104
	GX-41	Supporting Documents, 2nd Qtr. 2002	104	104
15	GX-42	Employee Wages, 3rd Qtr. 2002	104	104
	GX-43	Supporting Documents, 3rd Qtr. 2002	104	104
16	GX-44	Employee Wages, 4th Qtr. 2002	104	104
	GX-45	Supporting Documents, 4th Qtr. 2002	104	104
17	GX-46	Employee Wages, 1st Qtr. 2003	104	104
	GX-47	Supporting Documents, 1st Qtr. 2003	104	104
18	GX-48	Employee Wages, 2nd Qtr. 2003	104	104
	GX-49	Supporting Documents, 2nd Qtr. 2003	104	104
19	GX-50	Employee Wages, 3rd Qtr. 2003	104	104
	GX-51	Supporting Documents, 3rd Qtr. 2003	104	104
20	GX-52	Form 941, 1st Qtr. 1997	113	113
	GX-53	Form 941, 2nd Qtr. 1997	113	113
21	GX-54	Form 941, 3rd Qtr. 1997	113	113
	GX-55	Form 941, 4th Qtr. 1997	113	113
22	GX-56	Form 941, 1st Qtr. 1998	113	113
	GX-57	Form 941, 2nd Qtr. 1998	113	113
23	GX-58	Form 941, 3rd Qtr. 1998	113	113
	GX-59	Form 941, 4th Qtr. 1998	113	113
24	GX-60	Form 941, 1st Qtr. 1999	113	113
	GX-61	Form 941, 2nd Qtr. 1999	113	113
25	GX-62	Form 941, 3rd Qtr. 1999	113	113

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GOVERNMENT'S DOCUMENTARY EVIDENCE CONTINUED

3	No.	Description	Offered	Admitted
	GX-63	Form 941, 4th Qtr. 1999	113	113
4	GX-64	IRS Transcript, 1st Qtr. 2000	113	113
	GX-65	IRS Transcript, 2nd Qtr. 2000	113	113
5	GX-66	IRS Transcript, 3rd Qtr. 2000	113	113
	GX-67	IRS Transcript, 4th Qtr. 2000	113	113
6	GX-68	IRS Transcript, 1st Qtr. 2001	113	113
	GX-69	IRS Transcript, 2nd Qtr. 2001	113	113
7	GX-70	IRS Transcript, 3rd Qtr. 2001	113	113
	GX-71	IRS Transcript, 4th Qtr. 2001	113	113
8	GX-72	IRS Transcript, 1st Qtr. 2002	113	113
	GX-73	IRS Transcript, 2nd Qtr. 2002	113	113
9	GX-74	IRS Transcript, 3rd Qtr. 2002	113	113
	GX-75	IRS Transcript, 4th Qtr. 2002	113	113
10	GX-76	IRS Transcript, 1st Qtr. 2003	113	113
	GX-77	IRS Transcript, 2nd Qtr. 2003	113	113
11	GX-78	IRS Transcript, 3rd Qtr. 2003	113	113
	GX-79	IRS Transcript, Form 1040, 1998	113	113
12	GX-80	IRS Transcript, Form 1040, 1999	113	113
	GX-81	IRS Transcript, Form 1040, 2000	113	113
13	GX-82	IRS Transcript, Form 1040, 2001	113	113
	GX-83	IRS Transcript, Form 1040, 1988	113	113
14	GX-84	IRS Transcript, Form 1040, 1989	113	113
	GX-85	IRS Transcript, Form 1040, 1990	113	113
15	GX-86	IRS Transcript, Form 1040, 1991	113	113
	GX-87	IRS Transcript, Form 1040, 1992	113	113
16	GX-88	IRS Transcript, Form 1040, 1993	113	113
	GX-89	IRS Transcript, Form 1040, 1994	113	113
17	GX-90	IRS Transcript, Form 1040, 1995	113	113
	GX-91	Letter From Simkanin, 1-28-2000	121	121
18	GX-92	Amended Form 941, 1st Qtr. 1997	121	121
	GX-93	Amended Form 941, 2nd Qtr. 1997	121	121
19	GX-94	Amended Form 941, 3rd Qtr. 1997	121	121
	GX-95	Amended Form 941, 4th Qtr. 1997	121	121
20	GX-96	Amended Form 940-EZ, 1997	121	121
	GX-97	Amended Form 941, 1st Qtr. 1998	121	121
21	GX-98	Amended Form 941, 2nd Qtr. 1998	121	121
	GX-99	Amended Form 941, 3rd Qtr. 1998	121	121
22	GX-100	Amended Form 941, 4th Qtr. 1998	121	121
	GX-101	Amended Form 940-EZ, 1998	121	121
23	GX-102	Amended Form 941, 1st Qtr. 1999	121	121
	GX-103	Amended Form 941, 2nd Qtr. 1999	121	121
24	GX-104	Amended Form 941, 3rd Qtr. 1999	121	121
	GX-105	Amended Form 941, 4th Qtr. 1999	121	121
25	GX-106	Amended Form 940-EZ, 1999	121	121

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GOVERNMENT'S DOCUMENTARY EVIDENCE CONTINUED

No.	Description	Offered	Admitted
GX-107	Target Letter to Simkanin, 3-14-01	175	175
GX-113	Web page, 8-1-00	169	169
GX-114	Fax from James Kelly to Dianne Clemonds	45	45
GX-115	Signature Card, 7-9-96	145	145
GX-116	Signature Card, 1-3-00	145	145
GX-117	Signature Card, 7-13-01	145	145
GX-131	Letter to Joe Barton, 1-11-99	167	167
GX-132	Letter to Joe Barton, 8-2-00	167	167
GX-134	Barton Letter to Simkanin, 3-15-01	167	167
GX-136	IRS Letter to Simkanin, 6-30-00	157	157
GX-137	Simkanin Letter to IRS, 7-26-00	157	157
GX-138	IRS Letter to Simkanin, 8-18-00	157	157
GX-139	Simkanin Letter to IRS, 8-23-00	157	157
GX-140	IRS Letter to Simkanin, 9-11-00	157	157
GX-141	Simkanin Letter to IRS, 9-26-00	157	157
GX-142	IRS Letter to Simkanin, 10-4-00	157	157
GX-143	Simkanin Letter to IRS, 10-13-00	157	157
GX-144	IRS Letter to Simkanin, 12-20-00	157	157
GX-145	Simkanin Letter to IRS, 1-3-01	157	157
GX-146	IRS Letter to Simkanin, 1-19-01	157	157
GX-147	Simkanin Letter to IRS, 1-25-0	157	157
GX-148	E-mail From Morris to Simkanin, 2-21-01	151	151

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P R O C E E D I N G S ,

(Court Reporter's Note: This is a continuation from
Volume I. There have been no deletions or additions.)

THE COURT: Okay. At this time the defendant will
stand while the attorney for the government reads the
indictment.

MR. JARVIS: Indictment. The grand jury charges: At
all times material to the indictment, introduction.

One. The Internal Revenue Code requires employers to pay
to the United States the employer's share of Federal Insurance
Contribution Act taxes, FICA or social security taxes, and
Medicare taxes owing on wages paid to employees.

Two. The Internal Revenue Code also requires employers to
withhold from the wages of their employees, the employees'
share of FICA taxes, Medicare taxes, and income taxes, to
account for these taxes, and to pay withheld amounts over to
the United States.

Three. A person is responsible for collecting, accounting
for, and paying over the employees' share of FICA, Medicare,
and income taxes if he has the authority to exercise
significant control over the employer's financial affairs,
regardless of whether the individual exercised such control in
fact.

Four. A person willfully violates his duty to collect,
account for, and pay over FICA, Medicare, and income taxes if

1 he knew of the duty and he voluntarily and intentionally
2 violated that duty.

3 Five. On or about April 5, 1982, Arrow Custom Plastics,
4 Inc., (Arrow) was incorporated in the State of Texas, with its
5 principal place of business in Bedford, Texas. From April of
6 1982, when the company was formed, through and including the
7 dates included in this indictment, Arrow was engaged in the
8 business of the production of customized plastic molds for
9 various manufacturers. At the time of incorporation, through
10 and including the dates included in the indictment, Richard
11 Michael Simkanin (Simkanin or the defendant) served in the
12 capacity of President and Chief Executive Officer of Arrow.

13 Six. From the date of Arrow's incorporation through
14 approximately September 2001, Simkanin was the sole shareholder
15 of Arrow Custom Plastics, Inc. Sometime in August of 2001,
16 Simkanin was informed by the government that he must produce
17 Arrow's corporate documents. Shortly after receiving notice to
18 produce these corporate documents, in September of 2001,
19 Simkanin caused the dissolution of Arrow Custom Plastics, Inc.
20 From about September 2001 through the dates included in the
21 indictment, Simkanin continued to operate and control the
22 business as a sole proprietorship under the name Arrow Custom
23 Plastics (Arrow).

24 Seven. Simkanin had the authority to exercise
25 significant control over the financial affairs of Arrow. This

1 fact made Simkanin responsible for collecting FICA, Medicare,
2 and income taxes from the wages of Arrow employees, accounting
3 for those taxes, and paying those taxes over to the United
4 States Treasury through the IRS.

5 Eight. Prior to December 1999, Simkanin caused Arrow to
6 withhold, account for, and pay over FICA, Medicare --

7 THE COURT: Let me interrupt you, Mr. Jarvis. I told
8 the marshal he can unlock the courtroom and allow the
9 spectators in. So we won't be disrupted, let's let the
10 spectators come on in before you continue reading with the
11 indictment.

12 MR. JARVIS: Yes, sir.

13 THE COURT: You can be seated for the time being,
14 Mr. Simkanin.

15 (Brief pause.)

16 THE COURT: I'm told that there are some news media
17 persons here, and I have advised the court personnel that they
18 can be seated in that front row to my right. So if there's
19 anyone associated with the news media, you can be seated in
20 that front seat on the right side.

21 (Brief pause.)

22 THE COURT: Mr. Davidson, when it appears that
23 everyone is in, lock the door because we're not going to have
24 people going in and out during the trial.

25 THE U.S. MARSHAL: Yes, sir.

1 THE COURT: And I might mention that to all in the
2 courtroom. We're not going to have people going in and out of
3 the courtroom during the trial. The front door will be locked,
4 so unless you have -- If you're in here now and don't want to
5 stay until the next recess, you need to know that you should
6 leave, because we're simply not going to have traffic coming in
7 and out of the courtroom.

8 Okay. You may proceed, Mr. Jarvis.

9 MR. JARVIS: Thank you, Your Honor. Paragraph eight.
10 Prior to December 1999, Simkanin caused Arrow to withhold,
11 account for, and pay over FICA, Medicare, and income taxes from
12 the wages of Arrow employees.

13 Nine. In or about December 1999, and again in or about
14 June of 2000, Simkanin called meetings for Arrow employees to
15 inform them that Arrow would no longer withhold taxes from
16 employee paychecks. Simkanin also encouraged employees to file
17 amended tax returns and request refunds of taxes that employees
18 had previously paid.

19 Ten. Beginning sometime in or about late 1999 or shortly
20 thereafter, Simkanin instructed Arrow's bookkeeper to no longer
21 collect, account for, and pay over taxes from the wages of
22 Arrow employees. On or about November 5, 1999, Simkanin told
23 Arrow's accounting firm that effective January 1st, 2000, Arrow
24 was no longer going to withhold taxes from the wages of Arrow's
25 employees. On or about November 5, 1999, Arrow's accounting

1 firm advised Simkanin against this course of action and sent
2 Simkanin a copy of Section 3402 entitled, "Requirements of
3 Withholding." As a result of Simkanin's decision to not
4 withhold taxes from January 1st, 2000, through the present,
5 Simkanin was able to retain \$175,032 in taxes that Simkanin
6 was obligated to pay as the employer's share of the taxes
7 due.

8 Eleven. During the period beginning at least 1997 through
9 the present, Simkanin took several steps to demonstrate that
10 Simkanin did not consider himself subject to the jurisdiction
11 of the laws of the United States and the State of Texas.
12 During this period, Simkanin also challenged the
13 constitutionality of both federal and state laws.

14 Twelve. To demonstrate that he was not subject to the
15 jurisdiction of the State of Texas, sometime on or before 1997
16 Simkanin surrendered his Texas driver's license to the Texas
17 Department of Motor Vehicles. However, Simkanin continued to
18 operate a motor vehicle on the public streets and highways of
19 Texas without a valid driver's license.

20 Thirteen. On or about February 12, 2002, Simkanin filed a
21 Notice of Expatriation and Repatriation with the Secretary of
22 the Treasury as part of his effort to demonstrate that he was a
23 stranger to the laws of the United States and no longer subject
24 to the laws of the United States. In this document, Simkanin
25 also stated that certain tax laws of the United States violated

1 the Constitution of the United States. In this document,
2 Simkanin also stated that he refused to support the present
3 insurgent government and that his only allegiance was to the
4 Texas Republic.

5 Fourteen. On or about February 18, 2002, Simkanin signed
6 an affidavit which also stated that he was not a Fourteenth
7 Amendment citizen and was not within the jurisdiction of the
8 corporate United States and its instrumentalities.

9 Fifteen. Beginning on or about August of 2001, Simkanin
10 posted a document on his website entitled, "Foreign
11 Jurisdiction," in which he stated that the jurisdiction of the
12 United States government is limited to the District of Columbia
13 and military installations.

14 Sixteen. On or about March 2nd, 2001, Simkanin agreed to
15 use his photo in a full page advertisement in the newspaper USA
16 Today in which the constitutionality of the tax laws of the
17 United States were challenged.

18 Counts 1 through 12, willful failure to collect, account
19 for, and pay over taxes due, a violation of 26 United States
20 Code, Section 7202.

21 One. The allegations contained in paragraphs 1 through 16
22 of the introduction are incorporated herein by reference as
23 though they were fully restated.

24 Two. On or about the dates listed below, in the Fort
25 Worth Division of the Northern District of Texas, Richard

1 Michael Simkanin, defendant, did willfully fail to collect,
2 truthfully account for, and pay over to the Internal Revenue
3 Service the federal income taxes, Medicare taxes, and Federal
4 Insurance Contribution Act taxes due and owing to the United
5 States of America from the total taxable wages of Arrow
6 employees for each quarter listed below in Counts 1 through 12
7 respectively.

8 Count 1. Tax quarter ending date, March 31, 2000. Total
9 wages subject to collection, \$240,217. Total taxes not
10 collected, \$18,377.

11 Count 2. Quarter ending date, June 30, 2000. Wages
12 subject to collection, \$234,704. Taxes not collected, \$17,955.

13 Count 3. Quarter ending September 30, 2000. Wages
14 subject to collection, \$236,928. Taxes not collected, \$18,125.

15 Count 4. Quarter ending December 31, 2000. Wages subject
16 to collection, \$263,427. Taxes not collected, \$20,152.

17 Count 5. Quarter ending date, March 31, 2001. Wages
18 subject to collection, \$233,309. Taxes not collected, \$17,848.

19 Count 6. Quarter ending June 30, 2001. Wages subject to
20 collection, \$162,197. Taxes not collected, \$12,408.

21 Count 7. Quarter ending September 30, 2001. Wages
22 subject to collection, \$165,738. Taxes not collected, \$12,679.

23 Count 8. Quarter ending December 31, 2001. Wages subject
24 to collection, \$177,689. Taxes not collected, \$13,593.

25 Count 9. Quarter ending date, March 31, 2002. Wages

1 subject to collection, \$146,217. Taxes not collected, \$11,186.

2 Count 10. Quarter ending date, June 30, 2002. Wages

3 subject to collection, \$141,907. Taxes not collected, \$10,856.

4 Count 11. Quarter ending date, September 30, 2002. Wages

5 subject to collection, \$144,610. Taxes not collected, \$11,063.

6 Count 12. Quarter ending date, December 31, 2002. Wages

7 subject to collection, \$141,048. Taxes not collected, \$10,790.

8 For a total of Counts 1 through 12, wages subject to

9 collection, \$2,287,991. Total taxes not collected, \$175,032.

10 Of this total amount of \$175,032 taxes due from employees, the

11 employer, Simkanin, was also obligated to pay or match the same

12 amount, \$175,032, which was the employer's 7.65 percent share

13 of the FICA and Medicare taxes. All in violation of Title 26,

14 United States Code, Section 7202.

15 Counts 13 through 27, false claims against the United

16 States, in violation of Title 18 United States Code, Section

17 287.

18 One. The allegations contained in paragraphs one through

19 sixteen of the introduction are incorporated herein by

20 reference as though they were fully restated.

21 Two. On or about January 28 of 2000, in the Fort Worth

22 Division of the Northern District of Texas, Richard Michael

23 Simkanin, defendant, as president of Arrow, did knowingly make

24 and present and cause to be made and presented to the United

25 States Treasury Department, through the Internal Revenue

1 Service, 15 false claims against the United States, claiming
2 that payment of refunds of the employer's share of FICA taxes
3 and Medicare taxes paid by Arrow and by the employees' share of
4 FICA taxes, Medicare taxes, and income taxes collected from
5 Arrow's employees, covering the period of March of 1997 through
6 December of 1999, each of which the defendant knew to be false,
7 fictitious, and fraudulent, for each of Counts 13 through 27
8 respectively.

9 Count 13. Form submitted, Amended Form 941. Period
10 ending 3-31-97. Refund, \$18,120.

11 Count 14. Form submitted, Amended Form 941. Period
12 ending 6-30 of '97. Refund, \$17,310.

13 Count 15. Form submitted, an Amended Form 941. Period
14 ending 9-30-97. Refund amount, \$16,517.

15 Count 16. Amended Form 941. Period ending 12-31-97.
16 Refund, \$18,508.

17 Count 17. Amended Form 941-EZ, dated 12-31-97. Refund,
18 \$2,548.

19 Count 18. Amended Form 941, dated 3-31-98. Refund,
20 \$16,295.

21 Count 19. Amended Form 941, dated 6-30 of '98. Refund,
22 \$17,616.

23 Count 20. Amended Form 941, dated 9-30-98. Refund,
24 \$18,677.

25 Count 21. Amended Form 941, dated 12-31-98. Refund,

1 \$19,979.

2 Count 22. Amended Form 940-EZ, dated 12-31-98. Refund,
3 \$2,291.

4 Count 23. Amended Form 941, dated 3-31-99. Refund,
5 \$18,766.

6 Count 24. Amended Form 941, dated 6-30-99. Refund,
7 \$19,049.

8 Count 25. Amended Form 941. Period ending, 9-30 of '99.
9 Refund, \$22,829.

10 Count 26. Amended Form 941, dated 12-31-99. Refund,
11 \$22,818.

12 Count 27. Amended Form 940-EZ, dated 12-31-99. Refund,
13 \$3,192.

14 All in violation of Title 18, United States Code, Sections
15 287 and 2.

16 Counts 27 through 31, failure to file individual income
17 tax returns, in violation of 26 United States Code, Section
18 7203.

19 One. The allegations contained in paragraphs one through
20 sixteen of the introduction are incorporated herein by
21 reference as though they were fully restated.

22 Two. On or about the dates listed below, Defendant
23 Richard Michael Simkanin, who is married and was a resident of
24 Bedford, Texas, which is a community property state, had and
25 received approximate gross income in the amounts listed below,

1 such amounts computed on the community property basis, and by
2 reason of such income, the law required the defendant to file a
3 tax return with respect to income, following the close of the
4 below listed calendar years and the below listed filing
5 deadlines, and to make such return to the District Director of
6 the Internal Revenue Service for the Internal Revenue District
7 of Dallas, at Dallas, Texas, or to the Director of the Internal
8 Revenue Service Center, at Austin, Texas, or other proper
9 officer of the United States, stating specifically the items of
10 his gross income and any deductions and credits to which he was
11 entitled; that well-knowing and believing all of the foregoing,
12 the defendant did willfully fail to make said income tax return
13 to the said Director of the Internal Revenue Service, to said
14 Director of the Internal Revenue Service Center, or to any
15 other proper office of the United States, for each of Counts 28
16 through 31 respectively:

17 Count 28. Calendar year 1998. Filing deadline, April 15,
18 1999. Approximate gross income, \$42,933.

19 Count 29. Calendar year 1999. Filing deadline, April 17,
20 2000. Approximate gross income, \$62,007.

21 Count 30. Calendar year 2000. Filing deadline, April 16,
22 2001. Approximate gross income, \$189,750.

23 Count 31. Calendar year 2001. Filing deadline, April 15,
24 2002. Approximate gross income, \$115,500.

25 All in violation of Title 26, United States Code, Section

1 7203.

2 THE COURT: How does the defendant plead to the
3 counts of the indictment?

4 THE DEFENDANT: Not guilty.

5 THE COURT: Okay. Y'all can be seated.

6 Okay. Mr. Jarvis, you can make your opening statement at
7 this time.

8 MR. JARVIS: Your Honor, could I have a warning after
9 I've used four minutes?

10 THE COURT: Okay.

11 MR. JARVIS: Good afternoon, members of the jury.

12 We're going to bring to you eleven witnesses in our case in
13 chief. The first witness will be Dianne Clemonds. She was the
14 -- considered the responsible -- will testify the defendant was
15 the responsible party, the one responsible to have taxes
16 withheld and paid. She will testify that once she realized in
17 the summer of '99 that the atmosphere had changed, she became
18 concerned. She will testify the defendant told her that she
19 and the other employees were slaves if they pay taxes. She
20 responded to him that it's against the law. She will testify
21 that he named her as the president even though that was a
22 figurehead and a facade. He needed someone to flow things
23 through so that he could "drop out" of the system.

24 She will testify that he received a minimum of 1,000 to
25 \$1500 a week in cash through the corporation and that business

1 expenses at the company were paid by check and not by cash.

2 She will testify in March and April of '99, \$90,000 was
3 withdrawn at the defendant's request and he had her go to the
4 bank to do it. She will testify she was increasingly concerned
5 in late 1999 to the point where she asked for the accounting
6 firm to send a copy of the law she could give to the defendant.
7 She put it on his desk, and he continued with this course of
8 action.

9 Our second witness will be James Kelly who had the
10 face-to-face routine contact from the accounting firm with the
11 defendant's firm, did the returns, and so on. He will testify
12 he prepared individual tax returns for both the defendant and
13 his wife for '93, '94, and '95. And when he asked the
14 defendant if he wanted Mr. Kelly to prepare individual returns
15 in '96 and '97, the defendant told him, no, there's no income.
16 I'm not getting any income from Arrow. I'm not taking any
17 funds from Arrow. We will have other witnesses who will
18 testify that was not true.

19 Mr. Kelly had a conversation in the summer of '99 where
20 the defendant told him -- this is the defendant speaking to
21 Kelly, "That I'm a free and sovereign citizen. There's no
22 legal requirement for me to pay taxes. The federal government
23 has no jurisdiction over me. I'm a free man and as a free man,
24 a free and sovereign citizen, I have no obligation to pay taxes
25 or file any kind of tax returns." Kelly will testify he also

1 sent a copy of the law to Mr. Simkanin, who ignored it.

2 Mr. Taylor, our third witness, is a senior partner of that
3 accounting firm. He will testify in March of 2000, after Kelly
4 was unsuccessful in dissuading the defendant in March of 2000,
5 Mr. Fred Taylor, the senior partner, had a meeting; and at that
6 meeting he told the defendant that the law required
7 withholding. The defendant told Mr. Taylor, "The Internal
8 Revenue Code does not apply to me. I'm not subject to the
9 rules of the Internal Revenue Code, and the IRS is not the real
10 law." Taylor told him that the law required him to withhold
11 and he would get into legal trouble if he persisted.

12 Our fourth witness, Al Sharp, will bring in wage data to
13 show that wages were paid to employees of Arrow as alleged in
14 the indictment.

15 Mr. Dean, Robert Dean of IRS, will come in and talk about
16 the defendant had a history of filing these tax returns,
17 withholding/941s, for '97, '98, and '99. And suddenly in 2000
18 he just stopped filing his withholding on his taxes.

19 Our next witness, Mr. Cooper, also with the IRS, will
20 testify that he considered the claim that was filed in January
21 of 2000 by the defendant asking for a refund of all the taxes
22 that had been paid in '97, '98, and '99. That claim was
23 denied. Mr. Cooper will testify he had a telephone
24 conversation with the defendant. The defendant explained his
25 position that, well, wages are not taxable income. That's what

1 the defendant told Cooper, and Cooper said, well, that's not
2 true and the courts have repeatedly rejected that argument.
3 And the defendant continued with his course.

4 Our seventh witness, Randy Perdue, will testify that over
5 a period of March of '99 though April of 2003, the defendant,
6 through CTRs, withdrew over a half million dollars, \$567,000 in
7 cash in \$100 bills --

8 THE COURT: You used four minutes, Mr. Jarvis.

9 MR. JARVIS: Thank you, Your Honor.
10 -- from the bank account.

11 Our eighth witness, Phillip Eastman, will testify about
12 some correspondence between the defendant and the IRS.

13 Our tenth witness, Ron Wright, will testify that he worked
14 for Congressman Barton, and on August 2nd of 2000 -- or excuse
15 me, March of 2001 Congressman Barton told the defendant the law
16 requires you to withhold the taxes. Wages are taxable income.
17 It's taxable, and included were a bunch of IRS sources to
18 Mr. Simkanin.

19 Our last witness will be Special Agent Allan McGowan who
20 will testify about numerous IRS resources that are available to
21 the defendant and any other citizen. It lists all the court
22 decisions showing the defendant's position has been rejected in
23 the past.

24 In sum, the evidence will show the defendant was
25 repeatedly warned what the law required. He rejected that

1 advice and continued to defy the law. Thank you.

2 THE COURT: Mr. McColl, does the defendant wish to
3 make an opening statement?

4 MR. McCOLL: We do, Your Honor.

5 THE COURT: Okay.

6 MR. McCOLL: Good morning, ladies and gentlemen. The
7 evidence that the defense will bring you will show that this
8 man, Dick Simkanin, an engineer, was trained to do things in a
9 logical manner. By the book, step-by-step. And that he built
10 a company from scratch over a 20-year period. It was very
11 successful. That he's a thermodynamic engineer that takes
12 great precision to be successful in that field and that he had
13 an excellent reputation and clients who thought that he gave
14 value and good product. Made everything for the things to go
15 on baseball bats to big stuff for industry.

16 That he paid millions in dollars in taxes because he
17 thought he had to. And in 1995 he began to distrust the IRS
18 because his tax bill went from 40,000 to 300,000, and his CPA
19 couldn't explain it. So he started asking other professionals,
20 and they couldn't explain it. That's just the way it is.

21 So he started on his own study, and he went to the SMU law
22 library and he looked in the Internal Revenue Code and he found
23 it incomprehensible. And he started looking at the original
24 source, the Constitution, and found out that there must be a
25 direct tax only on certain things, that the state can tax you

1 directly. But that an income tax is an indirect tax, and that
2 income, he found, and will so testify, is profit derived from
3 capital or labor or both. That is, that he found that income
4 is profit separated from capital or labor or both.

5 So he reached some tentative conclusions, but he studied
6 further and sought out advice from other people: CPAs,
7 lawyers, et cetera. And he concluded -- he found other things
8 and he felt he had been deceived. He found that he didn't have
9 to have a social security number, that he didn't have to
10 participate in the social security system. And he had always
11 been given the impression that that was mandatory.

12 He found out that lots of people don't participate legally
13 in the social security system: schoolteachers in Texas,
14 et cetera. So he gives notice to the IRS. He gets advice from
15 a CPA about how to go about giving notice that I'm not going to
16 withhold social security anymore from my wage earners. And he
17 gets advice, he follows it, and gives notice to the IRS, these
18 are the reasons I'm doing it, tell me if I'm wrong, and he does
19 it.

20 And when he does it, his business starts to decline. And
21 people tell him don't do this. You're killing yourself. But
22 he persisted. And time went on and he asked -- kept studying,
23 he asked for other information. And he realized that he had
24 wrongfully paid, in his judgment, the social security that he
25 had paid in earlier. So he asked for a refund. It was denied.

1 And when he asked for the refund, he sent in his reasons why he
2 asked for the refund. And when it was denied, it came back and
3 said, "But you can appeal." He didn't. He dropped it.

4 The next thing he gets is a subpoena to a grand jury. He
5 goes and makes a presentation, and the first grand jury takes
6 no action. The second grand jury is convened. He makes a
7 presentation, and they take no action. The third grand jury is
8 convened. He is not allowed to make a presentation, and they
9 indict. The fourth grand jury is convened, he's not allowed to
10 make a presentation and they reindict.

11 MR. JARVIS: Your Honor, I'd object to the suggestion
12 that the government asked the earlier grand juries for an
13 indictment. It's improper and it's --

14 MR. McCOLL: I think that's --

15 THE COURT: I'll instruct the jury to disregard all
16 of his comments about grand juries. That's not proper, and you
17 should disregard it.

18 You may proceed.

19 MR. McCOLL: Thank you, Your Honor.

20 Even though he dropped the matter and could have appealed
21 and didn't appeal, he gets indicted for falsely asking for the
22 refund back and for failure --

23 THE COURT: Let's don't argue, Mr. McColl. Let's
24 talk about what the evidence will be.

25 MR. McCOLL: Yes, sir. And --

1 THE COURT: Let's don't argue. Let's talk about what
2 the evidence will be.

3 MR. McCOLL: Yes, sir.

4 And the evidence will show you that he acted in good faith
5 in a step-by-step logical manner, going back to the
6 Constitution and the Supreme Court cases that he read that
7 interpret the Constitution, that there is no definition for
8 "income" in the Internal Revenue Code. That you have to look
9 to the United States Supreme Court cases.

10 THE COURT: You've used your time.

11 MR. McCOLL: And that he acted in good faith. Thank
12 you.

13 THE COURT: Okay. We're to the point where we will
14 start the evidence. We're going to take a recess for one hour.
15 We'll resume at 2:00 o'clock.

16 (Jury out, 1:00 p.m.)

17 THE COURT: Y'all can be seated.

18 Mr. McColl, before we -- Yes, come up.

19 (Court confers with U.S. Marshal.)

20 THE COURT: Mr. McColl, I would like to go ahead and
21 get Mr. Wayne Paul, witness Wayne Paul sworn. Has he arrived
22 yet?

23 MR. McCOLL: He has not arrived, Your Honor. He's
24 not here.

25 THE COURT: What is the latest report?

1 MR. McCOLL: I'll find out during the lunch hour and
2 report to the Court.

3 THE COURT: Okay.

4 MR. McCOLL: Your Honor, we offer at this point to
5 stipulate to that which was read in the indictment regarding --

6 THE COURT: If you have a stipulation you want to
7 make, put it in writing; and when you come back, if the
8 government will not join the stipulation, you can present it as
9 an admission and a stipulation by the defendant and we will see
10 what legal effect it will have once you do that.

11 MR. McCOLL: Thank you, Your Honor.

12 THE COURT: Okay. We're in recess for lunch.

13 (Court in recess, 1:03 p.m. until 2:21 p.m.)

14 THE COURT: Okay. Before we bring the jury in, and
15 it may be a few minutes because the delivery person bringing
16 the lunch over for the jurors was running late, and we're going
17 give them time to eat their lunch.

18 I received something that was filed during the lunch hour.
19 It looks like it was filed at 11:52 (sic) that appears to be a
20 proposed stipulation.

21 Have you seen that, Mr. Jarvis?

22 MR. JARVIS: Yes, Your Honor.

23 THE COURT: I take it that what Mr. McColl is trying
24 to do is eliminate the possibility that his withdrawals from
25 the place of business will be admitted in evidence as bearing

1 on Counts 28 through 31 of the indictment.

2 Is that what your goal is, Mr. McColl?

3 MR. McCOLL: Under Rule 403, yes, sir. I'm trying to
4 avoid unfair prejudice.

5 THE COURT: I'm just trying to find out if that's
6 what you're trying to do.

7 MR. McCOLL: That is correct.

8 THE COURT: To eliminate the possibility that they'll
9 be received in evidence, the withdrawals as relevant to Counts
10 28 through 31?

11 MR. McCOLL: That is correct, Your Honor. And any
12 unfair prejudice that might flow from the introduction of that
13 evidence.

14 THE COURT: Does the government concede that what
15 he's filed would eliminate those things from being relevant as
16 to Counts 28 through 31? Frankly, I don't understand what the
17 document says, but maybe the government does understand what it
18 says.

19 MR. McCOLL: May I read it, Your Honor?

20 THE COURT: I can read your writing. I just don't
21 understand what you've said, Mr. McColl. I don't have any idea
22 what it refers to when it talks about government summary
23 exhibit and some other things.

24 MR. McCOLL: May I respond to clarify that?

25 THE COURT: Well, I've asked you -- I'm trying to

1 find out from Mr. Jarvis what the government's position is.

2 MR. JARVIS: I'm not real clear on the objective of
3 it, but based upon the form of the document we decline to
4 stipulate.

5 THE COURT: I don't think he's asking you to
6 stipulate.

7 Or are you asking the government to stipulate?

8 MR. McCOLL: Your Honor, I'm asking --

9 THE COURT: I'm simply asking: Are you asking the
10 government to stipulate, or is this simply an admission on the
11 part of your client?

12 MR. McCOLL: It's an admission asking the Court to
13 adopt it as such.

14 THE COURT: Okay. So it's not a requested
15 stipulation.

16 My question to you, Mr. Jarvis: Taking it as an
17 admission, does it, in your view, eliminate the possibility
18 that the withdrawals from the bank account would be admissible
19 as bearing on Counts 28 through 31?

20 MR. JARVIS: No, Your Honor.

21 THE COURT: And why does it not?

22 MR. JARVIS: Because the total amount withdrawn, we
23 think the jury ought to know the total amount of cash and
24 income.

25 THE COURT: Well, why does it make any difference as

1 long as it's at least the amount of gross income alleged in the
2 indictment?

3 MR. JARVIS: Your Honor, I think it's a factual
4 matter the jury ought to know about.

5 THE COURT: Okay. Let me say this, Mr. McColl. I
6 can't guarantee that if you ever come up with a meaningful
7 admission that it will accomplish your objective, because the
8 government is still maintaining those things are admissible as
9 to the other counts of the indictment. But it occurred to me
10 if you're trying to create a record that would cause those
11 withdrawals not to be admissible in evidence as to Counts 28
12 through 31, the stipulation would be something to the effect
13 that the defendant stipulates and admits that during the
14 calendar year 1998 he received gross income as contemplated by
15 Count 28 of the indictment in the amount of \$42,933. And then
16 it would say the same thing as to Count 29, it would say the
17 same thing as to Count 30, and it would say the same thing as
18 to Count 31.

19 Now, if you want to prepare me a document signed by you
20 and your client to that effect, that probably will accomplish
21 your objective as to Counts 28 through 31. That does not
22 assure you that those withdrawals will not be admissible for
23 some other purpose.

24 MR. McCOLL: Yes, sir.

25 THE COURT: The government is still maintaining

1 they're admissible for some other purpose, and, of course, I'll
2 hear their arguments as the case goes along and take into
3 account their arguments as the situation exists from time to
4 time.

5 MR. McCOLL: Yes, sir. But we do so stipulate, and
6 my client is here to confirm that on the record, just as the
7 Court stated.

8 THE COURT: I want that in writing, Mr. McColl.

9 MR. McCOLL: Yes, sir.

10 THE COURT: Signed by you and your client.

11 Okay. Is the jury still eating?

12 THE COURT SECURITY OFFICER: No, sir.

13 THE COURT: Okay. Have them come in.

14 MR. McCOLL: Your Honor, the problem with writing
15 it --

16 THE COURT: Pardon me, Mr. McColl. You can be
17 seated. I wanted to say something to those in the audience.

18 In case you were not here this morning, those in the
19 audience, we're not allowing people to leave the courtroom
20 between recesses. So if someone is not in a position to stay
21 in the courtroom until we have the next recess, which might be
22 about two hours, you need to leave the courtroom now.
23 Otherwise, you will not be permitted to leave the courtroom
24 because we don't want traffic coming in and out of the
25 courtroom while the jury is listening to evidence.

1 Okay. Go ahead and get them in.

2 (Jury in, 2:27 p.m.)

3 THE COURT: Okay. Call your first witness,
4 Mr. Jarvis.

5 MR. JARVIS: Yes, Your Honor. We would call at this
6 time Dianne Clemonds.

7 THE COURT: Okay. For the information of the members
8 of the jury, all of these witnesses have appeared before me
9 before you came in the courthouse this morning -- or in the
10 courtroom, and were sworn to tell the truth. In other words,
11 they're all testifying under oath, even though you don't see
12 the oath being administered. There may have been one or two
13 witnesses who weren't here at that time, but this witness and
14 most of the other witnesses have already been sworn.

15 Okay. You may proceed.

16 MR. JARVIS: Thank you, Your Honor.

17 DIANNE ELLEN CLEMONDS,

18 having been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. JARVIS:

21 Q. For the record, ma'am, would you state your name and spell
22 it.

23 A. My name is Dianne, D-I-A-N-N-E; Ellen, E-L-L-E-N;
24 Clemonds, C-L-E-M-O-N-D-S.

25 Q. Directing your attention to the time period 1998 through

1 approximately late '99 to early 2000, were you an employee of
2 Arrow Custom Plastics?

3 A. Late '99 to 2000?

4 Q. Yes, ma'am.

5 A. Or, during '99 I was.

6 Q. So from the period -- Well, let me ask you: Were you ever
7 an employee at Arrow Custom Plastics?

8 A. Yes.

9 Q. Can you tell us about the rough time period, when you
10 started and when you left.

11 A. '88 through the end of '99.

12 Q. And during that period, could you tell us what positions
13 you held from the beginning and through when you left?

14 A. I went in as a file clerk; then did accounting clerk; did
15 some accounts payable; then toward the latter part starting in
16 probably '96, I started doing financials and tax returns and
17 things.

18 Q. Bookkeeping-type functions?

19 A. Yes.

20 Q. All right. Now, do you know the defendant in this case,
21 Richard Michael Simkanin?

22 A. Yes, I do.

23 Q. Was he the president and owner of Arrow Custom Plastics
24 during the entire period you were there?

25 A. Yes.

1 Q. Do you see him in the courtroom, ma'am?

2 A. Yes.

3 Q. If I'm number one, moving to my left two, three, and so
4 on, what number would he be?

5 A. Three.

6 THE COURT: She's identified the defendant.

7 MR. JARVIS: Thank you.

8 BY MR. JARVIS:

9 Q. And are you related to the defendant's wife, Carole
10 Simkanin?

11 A. I am.

12 Q. And how is -- What is that relationship?

13 A. I'm her -- She's my sister.

14 Q. Now, as the owner of Arrow Custom Plastics, was
15 Mr. Simkanin the responsible party as far as the person that
16 had to make sure taxes were paid and financial affairs were
17 handled?

18 A. Yes.

19 Q. Did he delegate that to you at times?

20 A. He was the one that made all the decisions.

21 Q. As far as filing various paperwork, did he direct you to
22 do that?

23 A. Yes.

24 Q. Let me direct your attention to approximately the summer
25 of 1999 and tell us if you can, did the atmosphere at the

1 company there change in any way?

2 A. There became more of a push to become --- or not be paying
3 taxes. He started talking much more to employees about it and
4 trying to get their cooperation.

5 Q. Was there ever a statement made to you that, "You're a
6 slave if you pay taxes"?

7 A. Oh, yes.

8 MR. McCOLL: Objection, leading.

9 THE COURT: Don't lead the witness.

10 BY MR. JARVIS:

11 Q. And who made that statement, ma'am?

12 A. Dick Simkanin.

13 Q. Did he make it to -- How many people did he make the
14 statement to?

15 A. He made it to people all the time.

16 Q. What was your -- Did there come a time when you were
17 placed on the bank account and credit cards as the president of
18 Arrow Custom Plastics?

19 A. Yes, sir.

20 Q. Tell us the circumstances.

21 A. Dick called me to his office one day.

22 Q. Give us a time frame if you would, just an approximate.

23 A. Approximately '97.

24 Q. Okay. He called you into his office?

25 A. Called me in his office, told me what he wanted to do,

1 that he needed to get out of the system, that I was to be
2 president. I signed on the bank accounts and put a credit card
3 in my name and those types of things.

4 Q. So you were the only one on the signature card at the bank;
5 is that correct?

6 A. Yes.

7 Q. Did he explain to you, the defendant, why he wanted you on
8 the bank account instead of himself?

9 A. Yes. Because he needed his social security number at the
10 bank. He didn't want to give that. He needed to, like I said,
11 drop out of the system.

12 Q. Excuse me. What exactly does that mean? Did he explain
13 that?

14 A. He didn't want to have to sign any kind of legal documents
15 or legal forms, have his name on anything. He didn't want to
16 be part of the system. He didn't want the government -- it's
17 almost like he didn't want the government to know he was there.
18 I don't know.

19 Q. When you acted as the president, did there come a time --
20 or while you functioned as the president, did Mr. Simkanin
21 continue to have the ultimate authority of the company?

22 A. Oh, yes.

23 Q. Beginning in approximately 1995 and '96, were you doing
24 the bookkeeping duties about that time?

25 A. Yes.

1 Q. Could you tell us if the defendant drew cash and if so how
2 much per week?

3 MR. McCOLL: Objection. May we approach?

4 THE COURT: No.

5 MR. McCOLL: I have a document that's new and
6 different from what we discussed, Your Honor.

7 THE COURT: No. Let's go ahead with the question.
8 You can approach at an appropriate time.

9 Go ahead, Mr. Jarvis.

10 A. It was approximately 1500 a week as, you know, a salary.

11 BY MR. JARVIS:

12 Q. All right. And how was that accomplished? How did you,
13 on an average of 1,000 to 1500 a week, how did you get that
14 money into Mr. Simkanin's hands?

15 A. Gave it to him.

16 Q. Did you have to go to the bank and make out a check, or
17 how did you accomplish that?

18 A. You know, during '95 and '96 it may have been -- no, that
19 wasn't a direct deposit. It was a check that was made out to
20 him.

21 Q. Was that -- you said that was compensation as a corporate
22 officer?

23 A. Yes.

24 Q. By the way, business expenses at Arrow during the time you
25 were there, were they paid by check or by cash?

1 A. By check.

2 Q. Let me direct your attention, ma'am, to Government's
3 Exhibit 127 and 128.

4 A. Okay.

5 Q. Have you had an opportunity to look through the various
6 copies of checks in Government's Exhibit 127 and 128?

7 A. Briefly.

8 Q. Do these represent some of the checks you're talking about
9 as far as funds given to Mr. Simkanin?

10 A. Yes.

11 Q. I direct your attention, ma'am, to March and April of
12 1999, specifically Government's Exhibit 118 and 119. Let me
13 know when you're there.

14 THE COURT: Let me have the parties approach the
15 bench at this time.

16 (Bench conference with lead attorneys:)

17 THE COURT: Let me see what it was that Mr. McColl
18 wanted to show me.

19 MR. MCCOLL: We've executed a document, my client and
20 me. We've amended this to say that we hereby stipulate to the
21 accuracy of the Government's Summary Exhibit No. 176 attached
22 to the stipulation. So that it shows the years in question,
23 for the gross income in question. That's the entire exhibit.
24 I was just going to attach that page, but I wanted to give you
25 the entire exhibit, and we stipulate to that.

1 THE COURT: Well, is this signed by your client?

2 MR. McCOLL: It is signed originally by the client,
3 Your Honor. Right down there, Dick Simkanin, and I re-signed
4 it and the original so you would have both.

5 THE COURT: Okay. If you want to make such a
6 stipulation, there's no way I can keep you from doing it if you
7 want to make this admission. Is that what you're doing, making
8 this admission on behalf of your client?

9 MR. McCOLL: What I'm doing --

10 THE COURT: Just answer my question, Mr. McColl. Is
11 your client making the admission in this document?

12 MR. McCOLL: Yes.

13 THE COURT: Okay. It's made. The admission is made.

14 MR. McCOLL: Yes, sir.

15 THE COURT: Okay.

16 MR. McCOLL: Thank you.

17 THE COURT: I'm not telling you what the effect of it
18 is, but you've made the admission for your client.

19 MR. McCOLL: May I go further and ask the Court at
20 this time that in light of that admission, that while we're
21 here at the bench, I'd ask that -- it becomes completely
22 unnecessary for the government's stated purpose on the record
23 here this morning for the cash withdrawal evidence to show --

24 THE COURT: What is it you want? Don't tell me what
25 the government has already told me. Tell me what you want.

1 MR. McCOLL: We would object. There's absolutely no
2 reason for it based on what the government's stated purpose was
3 this morning.

4 THE COURT: What's your response to that?

5 MR. JARVIS: Your Honor --

6 THE COURT: Have you seen this?

7 MR. JARVIS: No, Your Honor.

8 THE COURT: Okay.

9 MR. McCOLL: I've added that one sentence there that
10 says, "and the gross income is as stated in Government's
11 Exhibit 176 attached," signed by the defendant.

12 THE COURT: Why don't we put an indication that was
13 filed -- it has a file mark on it.

14 MR. McCOLL: Yes, sir.

15 THE COURT: It was filed. Was this the same thing
16 you presented earlier?

17 MR. McCOLL: Well, Judge, there's been about five
18 minutes that's elapsed, and so I added. This is an addendum to
19 this exhibit where we said -- we attach the exhibit and said --
20 with the client's signature that we so stipulate.

21 THE COURT: You've written on the same document you
22 filed at 1:52, some other things?

23 MR. McCOLL: Well, not the same document. I created
24 a new document by writing on it.

25 THE COURT: Okay. This is not what I contemplated

1 you would do. But if you've done it and if you want to file it
2 as an admission, I'll put a new file stamp on it.

3 MR. McCOLL: Yes, sir.

4 THE COURT: I'll put a new file mark on it.

5 MR. McCOLL: Thank you, Judge.

6 THE COURT: I'll say it's filed at 1-5-04 at 2 -- and
7 I'll mark through the old file stamp -- at 2:37 p.m.

8 MR. McCOLL: Yes, sir.

9 THE COURT: Okay. Now, I'm taking this as an
10 admission by the defendant for whatever it is. I'm not sure I
11 understand what it says because I don't understand the
12 attachments. Are these attachments to it, these things that
13 are stapled to it?

14 MR. McCOLL: That's the government's exhibits.

15 THE COURT: Are these attachments to it?

16 MR. McCOLL: Yes, sir.

17 THE COURT: To what you just filed?

18 MR. McCOLL: Yes, sir.

19 THE COURT: Okay.

20 MR. McCOLL: In other words, I incorporated by
21 reference. Rather than to have to write it out, I just said we
22 stipulate to the gross income for the years that the government
23 is alleging.

24 THE COURT: Okay. It's not clear that's what this
25 says.

1 Now, what's the government's response to it?

2 MR. JARVIS: Yes, Your Honor. We still maintain that
3 evidence is admissible on the issue of intent and willfulness
4 on the other counts of the indictment.

5 THE COURT: I don't agree to that at this time. It
6 may be that you can persuade me somewhere along the line that
7 that's the case, but if it is, you can come back to it. Do you
8 agree that they've taken it out of consideration as to Counts
9 28 through 31?

10 MR. JARVIS: Yes, Your Honor.

11 THE COURT: By that admission?

12 MR. JARVIS: Yes, sir.

13 THE COURT: Okay.

14 MR. JARVIS: So does that mean that the motion in
15 limine is now granted?

16 THE COURT: I'm just saying I don't think it's
17 relevant to your other issues. Presumably you won't be asking
18 questions about things that I've already said are not relevant.

19 MR. JARVIS: All right, sir. Thank you.

20 (End of bench conference.)

21 BY MR. JARVIS:

22 Q. Ms. Clemonds, let me direct your attention to late 1999
23 and a particular time when Mr. Kelly --

24 THE COURT: Let me be sure I -- Y'all come back up
25 here just a minute.

1 (Bench conference with lead attorneys:)

2 THE COURT: Now, I'm going to have to make this known
3 to the jury somehow that he's made this admission and
4 stipulation. And my intent -- this won't make any sense to the
5 jury the way you've written it.

6 MR. McCOLL: Yes, sir.

7 THE COURT: My intent would be to say that your
8 client has stipulated that he received gross income in the
9 amount of that much.

10 MR. McCOLL: Yes, sir.

11 THE COURT: As alleged in Count 28 of the indictment
12 for the year 1998, and say the same thing as to each of those,
13 that your client has agreed and stipulated to that.

14 MR. McCOLL: Yes, sir.

15 THE COURT: And that will convey to the jury what I
16 think you're trying to do. Now, do you want me to do that?

17 MR. McCOLL: Yes, sir.

18 THE COURT: Okay. I'll do that now.

19 MR. McCOLL: Okay.

20 (End of bench conference.)

21 THE COURT: In order to save a little time, we have
22 an admission and stipulation by the defendant that will
23 eliminate the need for proof on these things, so listen closely
24 to what I'm going to tell you. And there won't be any need for
25 there to be proof on these things.

1 As alleged in Count 28 of the indictment, the defendant
2 received gross income during the year 1998 of at least \$42,933.
3 As alleged in Count 29 of the indictment, during the year 1999
4 the defendant received gross income in the amount of 62 -- or
5 at least in the amount of \$62,007.

6 As alleged in Count 30 of the indictment, the defendant
7 received gross income of at least \$189,750 during the year
8 2000. As alleged in Count 31 of the indictment, the defendant
9 received as gross income at least \$115,500 during the year
10 2001.

11 Does that accurately state the defendant's stipulation and
12 admission?

13 MR. McCOLL: Yes, sir.

14 THE COURT: Is that what the government understands
15 it is, Mr. Jarvis?

16 MR. JARVIS: Your Honor, it certainly accurately
17 states the admission.

18 THE COURT: That's all I asked you. Does it
19 accurately state the admission and stipulation?

20 MR. JARVIS: Yes, Your Honor.

21 THE COURT: Okay. You may proceed.

22 Those facts that I just stated will be deemed established
23 for all purposes in the record of this case without any further
24 proof of those facts.

25 BY MR. JARVIS:

1 Q. Ms. Clemonds, let me direct your attention to late 1999.

2 Were you present in -- Well, first of all, who is Jim Kelly?

3 Could you identify him?

4 A. Jim Kelly was our CPA who prepared year-end taxes. He was

5 our accountant.

6 Q. All right. Was he involved in the preparation of the

7 corporate tax returns for the company?

8 A. Yes.

9 Q. Did he also do some individual returns for the defendant?

10 A. Yes.

11 Q. How long had you known Mr. Kelly?

12 A. Oh, six, seven years.

13 Q. Directing your attention to the month or so before you

14 left, were you present shortly after a meeting between

15 Mr. Kelly and the defendant?

16 A. Yes.

17 Q. Could you tell us what you observed as far as after that

18 meeting was over?

19 A. Mr. Kelly and his senior partner left with a -- from a

20 meeting with Dick that they seemed a little distraught about.

21 Q. Who would "they" be?

22 A. Mr. Kelly and his senior partner. I believe his name is

23 Taylor. Kind of rolled their eyes and said that they could not

24 be a part of it.

25 Q. All right. And did you consult with an attorney, ma'am,

1 in December of '99 because of your concerns about you being a
2 part of this?

3 A. Yes, I did.

4 Q. And what was the name of that attorney?

5 A. The name of the attorney was Crill, and he's with Bracket
6 & Ellis.

7 Q. Following consultation with the attorney, did you decide
8 it would be in your interest to leave?

9 A. Yes. He told me --

10 MR. McCOLL: Objection, hearsay.

11 THE COURT: Don't say what he said. Just answer --

12 Restate the question.

13 Just listen close to the question.

14 BY MR. JARVIS:

15 Q. Without going into what he told you, after you consulted
16 with him, did you make a decision?

17 A. I did.

18 Q. What was that decision?

19 A. The decision was that as long as Dick was just talking, it
20 was okay. But if he started really acting, then --

21 MR. McCOLL: Objection, hearsay. It incorporates a
22 hearsay answer.

23 THE COURT: That is hearsay.

24 BY MR. JARVIS:

25 Q. My question is: Did you make a decision after you

1 consulted with the attorney about what your course of action
2 would be?

3 A. Yes. I was going to leave.

4 Q. Why were you concerned about staying with the company?

5 A. Because it was going to possibly put a liability --
6 responsibility on me if I was to stay.

7 Q. Now, let me direct your attention, ma'am, to Exhibit 114.
8 I believe it's open in front of you in the book. Let me know
9 when you're there.

10 A. Okay.

11 Q. Could you identify what Exhibit 114 is?

12 A. 114 is a fax from Mr. Kelly that I asked him to send
13 because I was concerned about Dick.

14 Q. The date on that is December 20 of '99?

15 A. Yes.

16 Q. Is it addressed to yourself, ma'am?

17 A. Yes.

18 MR. JARVIS: We would offer Government's Exhibit 114
19 at this time.

20 THE COURT: It's received.

21 BY MR. JARVIS:

22 Q. And tell us what were the circumstances, why did you ask
23 Mr. Kelly to send you this fax and what does the fax contain?

24 A. Because Dick was saying that as of January 2000 he was no
25 longer withholding FICA, Medicare withholding, federal

1 withholding period, and it became a concern to me because I
2 didn't want him going to jail.

3 Q. Did you try to talk him out of it?

4 A. I didn't -- we talked several times but, you know, we just
5 didn't have the same philosophy about it, so it became very
6 frustrating. So when I got this, I just took it and laid it on
7 his desk and hoped for the best.

8 Q. And it's from Mr. Kelly. Is that Jim Kelly the
9 accountant?

10 A. Yes.

11 Q. Was it sent at your request, ma'am?

12 A. Yes.

13 Q. Attached to it, does it have the actual statute from the
14 Internal Revenue Code that speaks to the requirement for
15 withholding?

16 A. Yes.

17 Q. After you put this document on Mr. Simkanin's desk, did he
18 have any further comment as far as you know? Did he come back
19 and discuss it with you?

20 A. No.

21 Q. Well, describe the circumstance when you and Mr. Simkanin
22 were talking and the decision was made for you.

23 A. Oh, that was -- I normally go on vacation during Christmas
24 and the New Year's, and when it was obvious that this was going
25 to happen -- it was not if.

1 Q. What do you mean when you say "this" was going to happen?

2 A. The stopping of withholding of the taxes and all that.

3 MR. McCOLL: Objection, relevance.

4 THE COURT: Overruled.

5 A. Then before I left I sent him an e-mail telling him that I

6 couldn't sign on the bank statement anymore, that he needed to

7 go down to the bank and sign up. And when I came back from

8 vacation, as soon as I walked in he asked me what "this" was,

9 and I told him.

10 THE COURT: "This" being what, the letter?

11 THE WITNESS: The e-mail, that I could no longer be a

12 part of --

13 THE COURT: Okay.

14 THE WITNESS: -- the payroll.

15 THE COURT: Okay. I just wanted to clarify that.

16 THE WITNESS: I could no longer be a part of the

17 payroll, that he needed to go down to the bank and sign.

18 BY MR. JARVIS:

19 Q. Speaking of the bank, we'll come back to that. Would you

20 look at the very next exhibit, Exhibit 115, if you would,

21 please. Do you see that, ma'am?

22 A. Yes.

23 Q. Is that the signature card for the bank account you're

24 talking about with your signature on it?

25 A. Yes.

1 Q. And why did you tell Mr. Simkanin you wanted -- you no
2 longer could be on the bank account?

3 A. Because I couldn't take that responsibility, that
4 liability, you know. I wasn't going to go to jail for him.

5 MR. McCOLL: Objection. It's repetitive.

6 THE COURT: Do you have a legal objection?

7 MR. McCOLL: Asked and answered.

8 THE COURT: I'll overrule the objection.

9 BY MR. JARVIS:

10 Q. Ma'am, as far as the employees' options, were they given
11 options at Arrow Custom Plastics as to some he would withhold,
12 the defendant would withhold from some but not from others?
13 Was there any kind of flexibility there?

14 A. No.

15 Q. Would you explain that.

16 A. If you didn't want to be part of the program, I guess you
17 could have left. You could have -- I think some employees went
18 ahead and paid their own taxes in addition to the employer's
19 FICA. But, you know, no, there was no question. You were part
20 of the program.

21 THE COURT: What do you mean "part of the program,"
22 that taxes would not be withheld from your income?

23 THE WITNESS: That's correct.

24 THE COURT: That was what was to happen to all the
25 employees?

1 THE WITNESS: That's correct.

2 THE COURT: Okay.

3 BY MR. JARVIS:

4 Q. And did, in fact, some employees leave?

5 A. Yes.

6 MR. JARVIS: Pass the witness.

7 THE COURT: Okay. Do you have any questions of this
8 witness?

9 MR. McCOLL: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. McCOLL:

12 Q. Good afternoon, ma'am.

13 A. Good afternoon.

14 Q. So part of the decision was to withhold social security
15 and Medicare -- to not withhold social security and Medicare;
16 is that correct?

17 A. That's correct.

18 Q. And did you have a discussion with Mr. Simkanin wherein he
19 explained that social security was, according to the Social
20 Security Administration, a matter of voluntary participation?

21 A. Not that I recall.

22 Q. Do you know that as a matter of fact that it --

23 THE COURT: Pardon me, Mr. McColl. As a matter of
24 fact, it's not. So let's don't get into things that --

25 MR. McCOLL: We would object to the Court's --

1 THE COURT: -- are incorrect such as that.

2 MR. McCOLL: We would object to the Court --

3 THE COURT: And limit your cross-examination to the
4 scope of the direct.

5 MR. McCOLL: We would object to the Court's remark as
6 being an inaccurate statement of the law.

7 THE COURT: You may proceed. It is not an inaccurate
8 statement of law, Mr. McColl. You may proceed with your
9 questioning. If you want to take up something with the Court,
10 you can do so at the appropriate time.

11 MR. McCOLL: So my objection is overruled, Your
12 Honor?

13 THE COURT: You may proceed.

14 MR. McCOLL: Thank you.

15 BY MR. McCOLL:

16 Q. In the document that you sponsored here as a witness, the
17 statement is made in Section (p) about voluntary withholding
18 agreements. Are you familiar with that statement in the
19 document that you talked about?

20 A. I've seen it.

21 Q. Do you know what that means?

22 A. No.

23 Q. This whole document is Section 3402 of the Internal
24 Revenue Code; is that correct?

25 A. Are you talking about what Mr. Kelly sent me?

1 Q. Yes. 3402?

2 A. Yes.

3 Q. You don't really know what 3402 means, do you?

4 A. No.

5 Q. Could you tell us what credit card that you had in the
6 name of the company?

7 A. Oh, American Express was in the company's.

8 Q. And Mr. Simkanin was still the CEO, correct?

9 A. Yeah.

10 Q. Okay. And did his employees consider him to be a good
11 boss, in your opinion?

12 MR. JARVIS: Your Honor, we object.

13 THE COURT: I sustain the objection.

14 MR. McCOLL: Thank you, ma'am.

15 MR. JARVIS: No further questions.

16 THE COURT: Okay. Can she be excused as a witness?

17 MR. JARVIS: Subject to recall, Your Honor.

18 THE COURT: Okay. You can step down. You're not
19 excused, because of the possibility the government would want
20 to call you back. But you can step down now and you'll, of
21 course, you'll leave the courtroom and wait until you hear from
22 them further. Thank you.

23 Okay. Call your next witness.

24 MR. KEMINS: We call Jim Kelly, Your Honor.

25 THE COURT: What's the witness's name?

1 MR. KEMINS: Jim Kelly, K-E-L-L-Y, Your Honor.

2 THE COURT: Okay. You may proceed, Mr. Kemins.

3 MR. KEMINS: Thank you, Your Honor.

4 JAMES P. KELLY,

5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. KEMINS:

8 Q. Sir, could you give us your full name, spelling your name
9 for the court reporter, please.

10 A. James P. Kelly.

11 Q. How do you spell your last name?

12 A. K-E-L-L-Y.

13 Q. And, sir, are you employed?

14 A. Yes.

15 Q. And by whom are you employed?

16 A. Simpson & Taylor accounting firm.

17 Q. And how long have you been with Simpson & Taylor?

18 A. Since 1996.

19 Q. How long have you been involved in the accounting field?

20 A. Since 1965.

21 Q. Could you briefly tell us your educational background,
22 please.

23 A. I have a degree from Texas A&M in agriculture and I have a
24 minor in accounting at UTA.

25 Q. Are you a CPA, sir?

1 A. No.

2 Q. In your career from when you started, have you been
3 involved in the preparation of corporate returns?

4 A. Yes.

5 Q. During your time in the accounting field, how many
6 corporate clients could you estimate you may have had?

7 A. 250 -- 200, 250. That's a guess.

8 Q. All right. Now, during your time at Simpson & Taylor, and
9 I guess specifically from 1993 to around 1999, was Arrow Custom
10 Plastics a client of Simpson & Taylor?

11 A. Yes.

12 Q. It was an account that you were, in effect, in charge of?

13 A. Yes.

14 Q. Did you get to know the owner of the company,
15 Mr. Simkanin?

16 A. Yes.

17 Q. And do you know Mr. Simkanin?

18 A. Yes.

19 Q. Do you see Mr. Simkanin in the courtroom here today?

20 A. Yes.

21 Q. Could you point him out, please.

22 A. Right there (indicating.)

23 Q. The man with the blue tie?

24 A. Yes.

25 THE COURT: He's identified the defendant.

1 MR. KEMINS: Thank you, Your Honor.

2 BY MR. KEMINS:

3 Q. When do you recall Arrow Plastics became a client of your
4 firm?

5 A. Actually, they became a client of the firm I was with in
6 1993.

7 Q. And --

8 THE COURT: That was a different firm from the
9 Simpson firm?

10 THE WITNESS: Yes, sir.

11 THE COURT: Okay. Go ahead.

12 BY MR. KEMINS:

13 Q. I guess, just so it won't confuse anybody, could --

14 THE COURT: He became an employee of the Simpson firm
15 in 1996, so he's saying that he was with some other firm before
16 that.

17 BY MR. KEMINS:

18 Q. But was that, in effect, what Simpson & Taylor is today?

19 A. Yes. Simpson & Unsworth became Simpson & Taylor in
20 1996.

21 Q. What services did Simpson & Taylor perform for Arrow?

22 A. We did corporate tax returns and we did personal tax
23 returns for Mr. and Mrs. Simkanin.

24 Q. Let me ask you: Are you familiar with the terms "cash
25 basis" and "accrual basis" method of accounting?

1 MR. McCOLL: Your Honor, may we approach the bench?

2 THE COURT: Yes.

3 (Bench conference with Mr. Kemins and Mr. McColl:)

4 MR. McCOLL: Judge, he's proposing to get expert
5 opinions from a guy who is not even a CPA on cash, accrual, et
6 cetera. He doesn't even have a degree in accounting. He's
7 got a minor.

8 THE COURT: I don't think he has to have a degree in
9 accounting. I overrule the objection.

10 MR. McCOLL: Well, it's under Daubert. I would just
11 like to make a record, under the Daubert Supreme Court case. I
12 don't think there's been a predicate laid for his expertise
13 under Rule 702 and we object.

14 (End of bench conference.)

15 THE COURT: Okay. Let me have the jury go back to
16 the jury room just a minute while we deal with an issue.

17 (Jury out, 3:01 p.m.)

18 THE COURT: Okay. Since the issue of his
19 qualifications has been raised, I'm excusing the jury long
20 enough for you to ask whatever questions you think are
21 appropriate to establish that he is qualified to answer
22 whatever questions you propose to ask him.

23 MR. KEMINS: And I point out, Your Honor, that we're
24 not using these --

25 THE COURT: I don't want you to argue with me. I

1 just want you to ask him questions.

2 MR. KEMINS: Yes, sir.

3 VOIR DIRE EXAMINATION

4 BY MR. KEMINS:

5 Q. Mr. Kelly, you testified that you've had over 250 clients,
6 is that correct, corporate clients?

7 A. Yes, sir.

8 Q. In your work with corporate clients and in your --

9 THE COURT: I think the last issue dealt with accrual
10 basis versus cash basis. Let's see if he's qualified to answer
11 the question you asked him on that subject.

12 BY MR. KEMINS:

13 Q. Mr. Kelly, do you understand the difference between cash
14 basis and accrual basis accounting?

15 A. Yes.

16 Q. And how is it that you understand this difference?

17 A. Would you would repeat the question.

18 Q. Why is it that you have knowledge of cash basis and
19 accrual basis method of accounting?

20 A. We use that a lot in my field. We use cash basis and
21 accrual basis accounting for different clients.

22 THE COURT: How long have you, altogether, been in
23 the accounting business?

24 THE WITNESS: About 38 years.

25 THE COURT: And throughout that time, have you had to

1 deal with the concepts of accrual basis accounting and cash
2 basis accounting?

3 THE WITNESS: Yes, sir.

4 THE COURT: And have you had to deal with all
5 aspects of accounting that have to do with keeping track of
6 the financial affairs of individuals and corporations
7 through partnerships and other entities throughout that
8 time?

9 THE WITNESS: Yes, sir.

10 THE COURT: Okay. I'll overrule the objection.

11 Call the jury back in.

12 (Jury in, 3:03 p.m.)

13 THE COURT: Okay. You may proceed.

14 MR. KEMINS: Thank you, Your Honor.

15 DIRECT EXAMINATION CONTINUED

16 BY MR. KEMINS:

17 Q. Mr. Kelly, in your work in accounting, you've become
18 familiar with both the cash basis and the accrual basis method
19 of accounting; is that correct?

20 A. Yes.

21 Q. Could you please provide a nutshell definition of cash
22 basis method of accounting, please.

23 A. In accrual basis accounting, you account for the income at
24 the point in time that you have the right to receive it. You
25 account for the expenses during the period of time the

1 accounting period that they apply to.

2 In cash basis accounting, you account for the income at
3 the time you receive the payment. You account for the expenses
4 at the time you pay the bill.

5 Q. Now, when Arrow became a client of your firm, what method
6 of accounting were they using?

7 A. Cash basis.

8 Q. And did you make a determination as to whether that was a
9 correct method of accounting for them?

10 A. I did.

11 Q. And what was your determination?

12 A. I determined that they weren't qualified to use that cash
13 basis of accounting.

14 Q. And why did you make that determination?

15 A. Because they had a material amount of accounts receivable
16 and inventories. The Internal Revenue Service regulation, I
17 believe it's No. 446, requires corporations -- C Corporations
18 to use the accrual basis of accounting.

19 Q. Now, you said that there was IRS rules. Besides that, is
20 your work governed by professional standards?

21 A. Yes.

22 Q. And what standards are those that it's governed by?

23 A. What standards?

24 Q. Yes. They're accepted accounting standards?

25 A. Oh, generally accepted accounting principles?

1 Q. Under those principles, would the answer be the same,
2 would Arrow still have to be an accrual basis taxpayer?

3 A. Yes.

4 Q. Now, when you reached this determination, did you discuss
5 this with Mr. Simkanin?

6 A. Excuse me?

7 THE COURT: When you determined that it should be on
8 an accrual basis instead of a cash basis, that is, Arrow
9 Plastics, did you discuss that with Mr. Simkanin?

10 THE WITNESS: Yes, sir.

11 BY MR. KEMINS:

12 Q. And did you explain to him the reasons why the change had
13 to be made?

14 A. Yes.

15 Q. And did he object to that?

16 A. No.

17 Q. Did you explain to him what impact that would have on
18 Arrow's tax liability?

19 A. Yes.

20 Q. And did he ask you any questions about that?

21 A. We discussed it. I don't recall any specifics.

22 Q. Now, the impact on Arrow Plastics' tax liability, did it
23 raise it or lower it?

24 A. It raised it temporarily.

25 Q. And the raise, did that money have to be paid immediately?

1 A. No.

2 Q. Over how long could it be paid over?

3 A. There are variations in the regulation, adjustments. Some
4 adjustments can be spread over three years and some over six
5 years.

6 Q. And did Arrow's changes fall into those periods?

7 A. Yes.

8 Q. So some would have to be paid back over three and some
9 would have to be paid back over six.

10 A. Right.

11 Q. Now, in front of you is a book of exhibits, and we've met
12 before today; isn't that correct? You and I have talked before
13 you got on the stand.

14 A. Yes, we did.

15 Q. Could I ask you to look in the book in front of you at
16 Government's Exhibits 4 through 9, please.

17 A. All right.

18 Q. Are those copies of corporate tax returns from the files
19 of Simpson & Taylor?

20 A. Yes.

21 Q. Are those copies of corporate tax returns you prepared for
22 Arrow Custom Plastics?

23 A. Yes.

24 MR. KEMINS: And, Your Honor, at this point I would
25 move Government's Exhibit 4 through 9 into evidence, please.

1 THE COURT: They're received.

2 MR. KEMINS: Thank you.

3 BY MR. KEMINS:

4 Q. Now, if you could turn back and just look at Exhibit 4,
5 please, first.

6 A. All right.

7 Q. And that's the 1993 1120 for Arrow; is that correct?

8 A. That's correct.

9 Q. And it says for the period ending 3-31-94?

10 A. Yes, sir.

11 Q. In March, is that when Arrow's fiscal year ended?

12 A. They had a March 31 year-end.

13 Q. And this would be the first return you prepared for them;
14 is that correct?

15 A. Yes, sir.

16 Q. And this was done under the accrual method of accounting;
17 is that correct?

18 A. Yes, sir.

19 Q. If you look down on line 13 -- no, excuse me, line 34 of
20 that return?

21 A. Line 34?

22 Q. Yes, sir.

23 A. Okay.

24 Q. Line 34 says "tax due," what Arrow had to send in with
25 that return; is that correct?

1 A. Yes. That's what's due at that moment.

2 Q. And how much is that amount on that return?

3 A. \$13,614.

4 Q. Now, as long as we're on this return, can I get you to
5 turn to the next page, please.

6 THE COURT: Let's save some time. If you want to
7 read from the return, you simply read from it. You don't need
8 to go through him to read from a return. It's already in
9 evidence.

10 MR. KEMINS: Yes, sir.

11 BY MR. KEMINS:

12 Q. Schedule E on this return is compensation to officers; is
13 that correct?

14 A. Correct.

15 Q. And it lists Mr. Simkanin as the officer and gives a
16 social security number, says he owns 100 percent of the
17 business and that he received \$79,500 in compensation for that
18 year; is that correct?

19 A. Yes, sir.

20 THE COURT: You misunderstand. You don't need to ask
21 him if something is correct. You have it in front of you.
22 It's in evidence. Simply read it if you want to read it.

23 MR. KEMINS: Yes, sir. On Government Exhibit 5, it's
24 in evidence, line 36 -- This is the 1994 1120 for Arrow Custom
25 Plastics for the period ending March 31st, 1995, on line 36

1 where it talks about the tax liability of Arrow for that year,
2 line 36 indicates that Arrow received a tax refund of \$116,607.

3 The Schedule E on this return indicates that one officer,
4 Mr. Simkanin, owned 100 percent of the common stock of the
5 business, received compensation in the amount \$72,925.

6 Schedule E on Exhibit 6, compensation of officers. It
7 lists one officer, Richard M. Simkanin, social security number,
8 says he owns 100 percent of the stock, and compensation in the
9 amount \$69,000.

10 BY MR. KEMINS:

11 Q. Now, Mr. Kelly, I would ask you to look at Government's
12 Exhibit 7, if you could, please.

13 A. (Witness complies.)

14 Q. Now, reading from the exhibit, the Schedule E on this
15 return, lists two corporate officers, a Dianne E. Clemonds and
16 a Bob M. Fitch, but it does not list Mr. Simkanin. And I would
17 point out that Government Exhibit 7 is the 1120 dated 1996 for
18 the quarter ending March 31st, 1997. You prepared this return;
19 is that correct?

20 A. That's correct.

21 Q. Did you ever receive an explanation why Mr. Simkanin was
22 no longer listed as an officer receiving compensation of
23 officers?

24 A. No, not directly.

25 Q. Did you ever inquire?

1 A. I asked.

2 Q. And who did you ask, if you recall?

3 A. Dianne Clemonds.

4 Q. Do you recall what she told you?

5 MR. McCOLL: Objection, hearsay, Your Honor.

6 THE COURT: That's hearsay. I sustain the objection.

7 BY MR. KEMINS:

8 Q. Now, you prepared other returns for Mr. Simkanin?

9 A. Yes, sir.

10 Q. And what returns were those?

11 A. Individual returns, Form 1040s.

12 Q. And do you recall what years you prepared those for?

13 A. '93, '94, and '95, I believe.

14 Q. Now, if you could look at Government's Exhibits 11 -- 10,
15 11, and 12, please. And you've looked at these before, have
16 you not?

17 A. Yes, sir.

18 Q. And these are certified copies of the 1040s filed by the
19 Simkanins for the years 1993, which is Exhibit 10; 1994, which
20 is Exhibit 11; and 1995, which is Exhibit 12. And is that your
21 signature that appears as the preparer's signature on each of
22 these returns?

23 A. Yes, sir.

24 Q. So these are the returns you prepared for the Simkanins.

25 A. Yes, sir.

1 MR. McCOLL: Your Honor, may we approach the bench?

2 THE COURT: Yes, if you want to.

3 (Bench conference with Mr. Kemins and Mr. McColl:)

4 MR. McCOLL: I don't understand the relevance of '93,
5 '94, and '95 for his personal returns.

6 THE COURT: What is the relevance?

7 MR. KEMINS: It shows a pattern of filing. He's
8 charged with failure to file.

9 THE COURT: Okay. I'll overrule the objection.

10 (End of bench conference.)

11 THE COURT: You may proceed.

12 MR. KEMINS: Yes, Your Honor. Thank you. At this
13 point, we would ask the Court to move into evidence
14 Government's Exhibit 10, 11, and 12.

15 THE COURT: They're received.

16 BY MR. KEMINS:

17 Q. Now, was this unusual for you to prepare the personal
18 returns for your corporate clients?

19 A. No, sir.

20 Q. Now, when the time came for the 1996 personal return, did
21 you ask Mr. Simkanin about preparing that return?

22 A. Yes, I did.

23 Q. His personal return.

24 A. Yes.

25 Q. And what, if anything, did he tell you about preparing a

1 1996 personal tax return?

2 A. He said he didn't have to file a tax return because he
3 didn't have any income for that year.

4 Q. Did you ask him further about that?

5 A. Well, not really. I mean, I didn't ask him why.

6 Q. Did you ask him what he had been living on?

7 A. Yes.

8 Q. And what was the answer you got?

9 A. He said he had savings.

10 Q. Did you ask him specifically whether he was getting any
11 money from Arrow Plastics?

12 A. I didn't ask him specifically. It didn't show up on the
13 financial statements.

14 Q. So the financial statement you looked at for that year
15 indicated no money from Arrow to Mr. Simkanin.

16 A. Right.

17 Q. Now, did you have a similar conversation with him when it
18 came time to prepare the 1997 return?

19 A. Yes.

20 Q. And did you get substantially the same answers?

21 A. Same answers.

22 Q. And did the 1997 financials of Arrow Custom Plastics, if
23 you recall, show any compensation to Mr. Simkanin?

24 A. No.

25 Q. Now, in your dealings with Mr. Simkanin, did there ever

1 come a time when he started to talk to you about beliefs that
2 the income tax might not be legal or proper?

3 A. Yes.

4 Q. Do you recall approximately when you first heard that from
5 him?

6 A. I don't recall exactly. I think probably it was sometime
7 in the summer of '99, early spring.

8 Q. Do you recall any details about that conversation, what he
9 may have told you?

10 A. No, not other than -- He gave me some information, which
11 supposedly backed this up, but I didn't have time to go into it
12 at the time.

13 Q. Did he use any terms with you? Did he throw around any
14 terms about why he didn't have to pay taxes?

15 A. Well, he said as a free man he didn't have -- he wasn't
16 required to file returns. It was voluntary.

17 Q. Did he explain to you by what he meant by being a "free
18 man"?

19 A. If he did, I don't recall.

20 Q. Did you express any opinion to him as to what you thought
21 of this argument, that is, as a free man he didn't have to pay
22 income taxes?

23 A. Only that I thought if he didn't file his returns that it
24 would get him in a lot of trouble.

25 Q. And what, if anything, did he say to you when you told him

1 you thought he would get in trouble?

2 A. No response that I recall.

3 Q. Now, did there come a time when Mr. Simkanin, besides
4 talking about his personal taxes, also told you that he planned
5 to stop withholding from Arrow employees?

6 A. Yes, sir.

7 Q. And do you recall when you heard that?

8 A. That was in around the first of November 1999.

9 Q. And do you recall what caused that conversation to happen?

10 A. Yes, sir.

11 Q. And what was that?

12 A. I delivered the 1999 -- 1998 corporate 1120 tax return to
13 him, and he told me at the time that he did not intend to file
14 -- he might not file that return and he didn't intend to file
15 the federal withholding returns, the 941s and the 940s, and he
16 didn't intend to withhold from the employees' salaries after
17 January the 1st.

18 Q. And when he told you that, what, if anything, did you say
19 to him?

20 A. I said that's illegal and that will get you in trouble.

21 THE COURT: The withholding you're talking about, is
22 that Medicare tax and social security tax and income tax?

23 THE WITNESS: That's federal withholding, Medicare,
24 and social security.

25 THE COURT: Pardon me. We can't both talk at the

1 same time. The withholding you're talking about, was that
2 Medicare tax, social security tax, and income tax?

3 THE WITNESS: Yes, sir.

4 THE COURT: That was related to the wages of the
5 employees of Arrow Plastics?

6 THE WITNESS: Sir?

7 THE COURT: That was related to the wages of the
8 employees of Arrow Plastics?

9 THE WITNESS: Yes, sir.

10 THE COURT: What the law requires to be held from
11 those wages?

12 THE WITNESS: Right.

13 THE COURT: Okay.

14 BY MR. KEMINS:

15 Q. And when you told him you thought that was illegal and
16 would get him in trouble, what, if anything, did Mr. Simkanin
17 say to you?

18 A. He asked me to send him proof of it.

19 Q. And did you, in fact, send him proof?

20 A. I did.

21 Q. I'll ask you now to turn in the book in front of you to
22 what's marked as Government's Exhibit 13, please.

23 A. All right.

24 Q. Government's Exhibit 13, it's a faxed cover sheet from you
25 to Mr. Simkanin?

1 A. Yes.

2 Q. And behind that is -- it looks like Section 3402 of the
3 income tax code; is that correct?

4 A. That's correct.

5 Q. Is that what you sent Mr. Simkanin?

6 A. Yes, sir.

7 MR. KEMINS: Your Honor, at this time we would ask
8 Government's Exhibit 13 be admitted into evidence, please.

9 THE COURT: It's received.

10 BY MR. KEMINS:

11 Q. Now, after Mr. Simkanin received this from you, did he ask
12 for any more information?

13 A. No, sir.

14 Q. Well, up till this conversation with Mr. Simkanin about
15 them not withholding -- and, again, when was that?

16 A. In --

17 THE COURT: He said November of 1999.

18 THE WITNESS: 1999.

19 BY MR. KEMINS:

20 Q. Up until that point, to your knowledge, had Arrow
21 consistently withheld from the employees' wages and filed the
22 necessary returns?

23 A. Yes, sir.

24 Q. When you first had your discussion that -- to reference
25 back to the summer of 1999 and Mr. Simkanin brought up this

1 free man concept with you, did he also combine that with a
2 discussion about his need for having a driver's license?

3 A. He told me he didn't have to have a Texas driver's license
4 and he didn't have one.

5 Q. As part of this discussion, did he also talk to you about
6 his automobile registration?

7 A. I believe he said it was registered in the Bahamas, as far
8 as I can remember.

9 Q. Now, after you found out that Mr. Simkanin was no longer
10 going to withhold, did you discuss this issue with anybody else
11 at your firm?

12 A. Mr. Taylor, the owner of the firm.

13 Q. Why did you discuss it with him?

14 A. It was his decision as to whether or not we continued to
15 work with Mr. Simkanin and Arrow Custom Plastics.

16 MR. KEMINS: No further questions, Your Honor. Thank
17 you. Pass the witness.

18 THE COURT: Do you have any questions of this
19 witness?

20 MR. McCOLL: Yes, Your Honor, I do.

21 Excuse me just a moment, Your Honor.

22 (Brief pause.)

23 MR. McCOLL: May I approach the witness, Your Honor?

24 THE COURT: Yes.

25 MR. KEMINS: Your Honor, may we approach the bench?

1 THE COURT: Yes.

2 (Bench conference with Mr. Kemins and Mr. McColl:)

3 MR. KEMINS: We're going to object to these exhibits,
4 Your Honor.

5 THE COURT: Why?

6 MR. KEMINS: Because they're the income tax law, and
7 the Court should be -- and we believe that's beyond the scope.

8 THE COURT: The microphone is turned off.

9 MR. KEMINS: Oh, I'm sorry.

10 THE COURT: Talk loud for me to hear you.

11 MR. KEMINS: We believe that this will be beyond the
12 scope of direct and that it's irrelevant because the Court
13 should be the source of the law to the jury in this case.

14 THE COURT: What is your point in it?

15 MR. McCOLL: I'm going to cross-examine him on how he
16 calculated these things and ask him if he took into
17 consideration certain things.

18 THE COURT: How he calculated what?

19 MR. McCOLL: Well, the things he's testified to, that
20 he had liability.

21 THE COURT: You mean on the tax returns?

22 MR. McCOLL: Yes, sir.

23 THE COURT: In other words, you're going to want him
24 to show you the tax laws that justify his conclusion on those
25 tax returns that he owed so much money and so on?

1 MR. McCOLL: Well, just in general sense did he
2 consider certain categories. It will be relatively brief, Your
3 Honor.

4 THE COURT: No, we're not going to get into that. I
5 sustain the objection to all these exhibits. I take it that's
6 the purpose of all that?

7 MR. McCOLL: Well, that's part of it.

8 THE COURT: I'll sustain the objection.

9 MR. McCOLL: Can I leave these here?

10 THE COURT: Well, you don't need to leave them here.
11 You can take that with you, Mr. McColl.

12 (End of bench conference.)

13 CROSS-EXAMINATION

14 BY MR. McCOLL:

15 Q. Sir, you sent 3402 to Mr. Simkanin; is that correct?

16 A. Yes, sir.

17 Q. And your doing that was an attempt to persuade him that he
18 needed to withhold taxes from his employees?

19 A. Yes, sir.

20 Q. You're familiar with the Internal Revenue Code, are you
21 not, sir?

22 A. Yes, sir.

23 Q. And the collection of income tax at the source is what you
24 sent him, Section 3402 on page 523 of that volume in front of
25 you; is that correct?

1 THE COURT: Do you have it as an exhibit, what you
2 sent him? Is one of the earlier exhibits what you sent him?

3 MR. KEMINS: It's Government Exhibit 13, Your Honor.

4 THE COURT: It's in evidence. He has as an exhibit
5 what he sent him. It's Government's Exhibit 13.

6 MR. McCOLL: This is the Code. It's a different
7 exhibit.

8 THE COURT: Okay. But I'm telling you in evidence is
9 Exhibit 13, which is what you sent him. Your question is what
10 did he send him.

11 MR. McCOLL: Right.

12 THE COURT: And I'm reminding you that in evidence is
13 what he sent him. We don't need the book to see what he sent
14 him.

15 BY MR. McCOLL:

16 Q. May I ask you if when you sent him that you understood the
17 definition of "employee" in the document that you sent him?

18 A. I understood what I thought I had been taught for years,
19 yes.

20 Q. Isn't the definition of "employee" --

21 MR. KEMINS: Objection, Your Honor. Beyond the
22 scope.

23 THE COURT: I'm going to sustain that objection.
24 That is beyond the scope of the direct.

25 You can come get your book back. He's not going to be

1 testifying in reference to the book and the other documents you
2 handed up there.

3 MR. McCOLL: Your Honor --

4 THE COURT: You can come get those back, if you would
5 like, Mr. McColl.

6 MR. McCOLL: May I leave it there for other purposes?

7 THE COURT: No. Come get them back, and if there's a
8 need for them later, you can bring them back up.

9 (Brief pause.)

10 BY MR. McCOLL:

11 Q. Now, you sent something to a client, and you
12 purported to tell him that he needed to do it or he would get
13 in trouble. And he was telling you that he didn't want to do
14 it; is that correct?

15 A. Yes, sir.

16 Q. And he was telling you that in his opinion he was not
17 obligated under the law to do it; is that correct?

18 A. Yes, sir.

19 Q. Did that cause you to look closely at the regulations that
20 you sent him to be sure they were applicable to him?

21 A. No, sir.

22 Q. Have you ever looked at the definition of "employee" that
23 applies to Section 3402 that you sent him?

24 MR. KEMINS: Objection, Your Honor.

25 MR. McCOLL: I can ask that question, Judge.

1 THE COURT: I think I've already sustained the
2 objection to that question. I sustain it again.

3 BY MR. McCOLL:

4 Q. When you sent it to him back then, did you know what the
5 definition of "employee" was?

6 A. I knew what I thought it was.

7 Q. What did you think it was?

8 A. An employee is somebody who works for an organization --
9 an entity and is employed by, under the direction of, that
10 entity.

11 Q. And that was your understanding?

12 A. Yes, sir.

13 MR. McCOLL: May I approach the witness, Your Honor?

14 THE COURT: Let me see what you're going to approach
15 him with.

16 (Bench conference with Mr. Kemins and Mr. McColl:)

17 MR. McCOLL: I want him to read the definition of
18 "employee" for purposes of 3402.

19 THE COURT: We're not going to play this game.

20 MR. McCOLL: That's not a game. That's the
21 definition.

22 THE COURT: Pardon me. Listen to what I'm saying
23 first.

24 MR. McCOLL: Yes, sir.

25 THE COURT: This says for purposes of this chapter

1 the term "employee" includes. It goes on to say the things it
2 includes. It does not say it's an inclusive definition
3 applicable to the issue of the section under consideration. So
4 we're not going to play that game. That obviously is not an
5 inclusive definition. So we're just not going to go through
6 that.

7 MR. McCOLL: But, Judge, it doesn't incorporate
8 anything else. It doesn't say this incorporates --

9 THE COURT: We're not going to go through that. I
10 sustain the objection.

11 (End of bench conference.)

12 BY MR. McCOLL:

13 Q. Sir, did you explain in detail why, in your opinion, there
14 had to be a change to be made from cash to the accrual basis?

15 A. Would you repeat the question, please.

16 Q. Did you explain to Mr. Simkanin in any detail as to how or
17 why the change had to be made from cash to the accrual basis?

18 A. Yes, sir.

19 Q. And what was the most important aspect of that
20 explanation, in your opinion?

21 MR. KEMINS: We're going to object. This has been
22 asked and answered already, Your Honor.

23 THE COURT: Well, I'll let him answer it again. I
24 think he's already said it was legally required.

25 Is that what you said?

1 THE WITNESS: Sir?

2 THE COURT: I think you said the law required it?

3 THE WITNESS: The law requires C Corporations to use
4 the accrual method of accounting.

5 THE COURT: Okay. Now, he's answered it again.

6 BY MR. McCOLL:

7 Q. I understand we talked about "the law," but as an
8 accounting minor from A&M what was your specific IRC that you
9 were relying on?

10 A. I couldn't give you the number. I don't remember.

11 Q. But you gave this advice to more than one corporate
12 client, correct?

13 A. Yes.

14 Q. And when you gave them that advice, you had to refer or
15 base your opinion on authority, correct?

16 A. True.

17 Q. And what was that authority?

18 A. I might be mistaken, but I think that authority was
19 Internal Revenue Code Section 446.

20 Q. And let me ask you: Isn't it correct that his tax bill
21 quintupled, or however you want to say it. It was five times
22 more than it had been going from the cash to the accrual basis?

23 A. No, sir.

24 Q. Well, looking at Exhibit No. 5, that -- or, yeah, that you
25 were asked to look at earlier. Actually, Government's Exhibit

1 No. 4.

2 A. No. 4?

3 Q. Yes, sir. Do you see that, sir?

4 A. Yes, sir.

5 Q. And so November 22nd, 1994, you're telling him please be
6 sure to make your estimated tax deposits on or before the date
7 indicated for each payment period. And then you've got down
8 payment periods, July 15th, 1994, \$40,000, roughly, correct?

9 A. Yes, sir.

10 Q. Now, that predated your letter, didn't it?

11 A. That's what?

12 Q. That date, July 15th, was before you wrote this letter in
13 November of the same year, correct?

14 A. July 1994. That was --

15 THE COURT: He wants to know if July in the year
16 comes before November of the year.

17 THE WITNESS: Yes, sir, it does.

18 THE COURT: Okay. We've got that figured out. Now
19 go on to another question.

20 BY MR. McCOLL:

21 Q. So wouldn't that mean -- and that would also be true for
22 the quarterly payments September 15th referred to in your
23 letter below that sentence.

24 A. Yes, sir.

25 Q. So wouldn't that indicate that you had already requested

1 of the company two payments of approximately \$40,300 each?

2 A. I believe those payments had already been made.

3 Q. Okay. And isn't it true that the IRS, under those
4 regulations that you talked about on direct, says when you go
5 from cash to the accrual basis, if you disagree with the tax
6 and we have to demand it of you, you got to pay it all at once.
7 But if you'll agree to it, we'll give you time to pay it out.
8 Isn't that correct?

9 A. I don't know.

10 Q. Do you know the regulations that allow you to -- the
11 number of the regulation that allows you to stretch it out over
12 three years?

13 A. Yes, sir.

14 Q. And what number is that?

15 A. Section 481.

16 Q. Six and 481?

17 A. Section -- Code Section 481.

18 Q. And which is the one that allows you to stretch it out
19 over six years?

20 A. The same code section.

21 Q. All right. Have you ever had a client say, "I protest
22 that tax. It's too much. Can we," you know. . .

23 A. No.

24 MR. KEMINS: Objection. It's beyond the scope of the
25 direct.

1 THE COURT: I think that is beyond the scope of the
2 direct, and I'll sustain the objection.

3 BY MR. McCOLL:

4 Q. Didn't Mr. Simkanin say to you during your conversations
5 when you were trying to explain why his bill increased under
6 the cash versus accrual method, that he was --

7 THE COURT: I'm sorry. I misunderstood something you
8 said earlier, if your question is correct.

9 Did Mr. Simkanin's, or Arrow Plastics', bill increase, tax
10 bill increase, because of the change from cash to accrual?

11 THE WITNESS: It increased temporarily, Your Honor.

12 THE COURT: What do you mean by that?

13 THE WITNESS: You're going to pay the same amount of
14 tax regardless. It just is a timing matter. If you're on an
15 accrual basis, you're going to pay the tax earlier, more than
16 likely, than you are if you're on a cash basis.

17 THE COURT: So when you made the conversion over,
18 there may be one year where you have sort of a piling up?

19 THE WITNESS: Exactly.

20 THE COURT: Go ahead. I think he did not say
21 ultimately that it increased, which your question implied. But
22 go ahead with your question.

23 BY MR. McCOLL:

24 Q. Well, isn't it true, sir, that they couldn't even pay the
25 accrual tax bill that you were indicating in this letter in

1 November?

2 A. Repeat the question.

3 Q. Isn't it true that they couldn't even pay, as of the date
4 of your letter in November, the tax bill that you had sent them
5 so far with regard to what they need to make in quarterly
6 deposits? They were unable to keep current; isn't that
7 correct?

8 A. I'm not understanding the question, I don't think.

9 THE COURT: He's trying to find out if Arrow Plastics
10 had enough money to pay its tax bill during that temporary
11 period when it converted over from cash to accrual.

12 THE WITNESS: I'm not sure they had enough money.
13 I'm not sure what the cash flow was at that point.

14 THE COURT: You don't know the answer to the
15 question?

16 THE WITNESS: I don't know the answer to the
17 question.

18 THE COURT: Okay.

19 BY MR. McCOLL:

20 Q. Well, doesn't the first letter of your -- the sentence of
21 your letter, rather, say that it shows -- the second sentence
22 says -- it shows a balance due of 13,600 --

23 THE COURT: Let's read it aloud. You don't need to
24 ask him what it says. Just read whatever you want to read in
25 the letter.

1 BY MR. McCOLL:

2 Q. The return shows a balance due of \$13,614.

3 A. Yes.

4 Q. That would indicate they haven't been able to pay --

5 THE COURT: Let's don't make an argument.

6 BY MR. McCOLL:

7 Q. -- correct?

8 A. It would indicate they hadn't paid, not that they haven't
9 been able to pay.

10 Q. They have not paid. And up until that time,

11 Mr. Simkanin had paid as well as he was required, correct?

12 A. Correct.

13 Q. What period of time did the IRS give Arrow Custom Plastics
14 to pay their new bill?

15 MR. KEMINS: Objection, Your Honor. That's been
16 asked and answered.

17 THE COURT: I'll let him answer it again if he's
18 already answered.

19 How long?

20 THE WITNESS: Six years.

21 BY MR. McCOLL:

22 Q. Are you certain about that, or could you think it might
23 have been three years?

24 A. Part of it is due in the first three years and then part
25 of it is due in the following three years, depending on the

1 adjustment.

2 Q. As I understand your testimony on direct examination --

3 THE COURT: You don't need to repeat his testimony.

4 Just ask a question if you have one.

5 MR. McCOLL: Yes, sir.

6 BY MR. McCOLL:

7 Q. Is it correct that Arrow Custom Plastics indicated that
8 there was no income to Mr. Simkanin in '96 and '97?

9 A. No income?

10 Q. No compensation of any kind?

11 A. For Mr. Simkanin?

12 Q. That's correct.

13 A. Yes, sir, that's true.

14 Q. So he wouldn't be required to have paid or to have filed
15 an income tax return for '96 or '97; is that correct?

16 A. Yes, sir.

17 THE COURT: Mr. Kelly, his question was, if Mr. -- I
18 guess this is his question: If, in fact, Mr. Simkanin had no
19 income for the years 1996 and 1997, would he be required to
20 file an income tax return?

21 THE WITNESS: No, sir, he would not.

22 THE COURT: I think that's what he was asking.

23 THE WITNESS: I'm sorry. I must have missed that
24 question.

25 THE COURT: Okay.

1 MR. McCOLL: Could I ask him to repeat the answer,
2 Your Honor?

3 THE COURT: He answered no.

4 MR. McCOLL: He wouldn't be required.

5 THE COURT: He answer no, Mr. McColl. Go ahead.

6 MR. McCOLL: Thank you.

7 BY MR. McCOLL:

8 Q. Now, in response to my question about the section
9 requiring a change from cash to accrual, I believe you cited
10 Section 446?

11 A. I believe that's right. I'm not --

12 MR. McCOLL: May I approach the witness, Your Honor?

13 THE COURT: No. Let's don't go back and forth. What
14 is it you want to ask him? Ask him a question.

15 BY MR. McCOLL:

16 Q. Where in 446 does it say there's a requirement to convert
17 -- or provide any indication that a conversion must be made
18 from the cash to the accrual basis?

19 A. I don't remember the subcategories -- I mean, the
20 subparagraphs under that regulation.

21 Q. Well, isn't it true it says in subsection (c), subject to
22 the provision --

23 MR. KEMINS: Objection, Your Honor.

24 THE COURT: I'm going to -- What is the legal basis
25 for the objection?

1 MR. KEMINS: It's irrelevant, Your Honor. He's
2 testified --

3 (Laughter from audience.)

4 MR. KEMINS: He's testified to the best of his
5 knowledge what he remembers. To ask him further questions from
6 the Code --

7 THE COURT: I don't think we're going to conduct a
8 test on his memory of the precise language of the Code.

9 MR. McCOLL: I'm not going to ask that, and I'll be
10 fair to the witness, Your Honor.

11 BY MR. McCOLL:

12 Q. But doesn't this section give the option to the taxpayer?

13 A. Give the option to the taxpayer?

14 Q. Yes, sir. Doesn't it say taxable income under any of the
15 following methods of accounting can be done?

16 A. Depending on the taxpayer.

17 Q. Right.

18 A. Some don't have that option, some do.

19 Q. And why was it that Mr. Simkanin didn't?

20 A. Two reasons. The Code requires C Corporations to use the
21 accrual method.

22 Q. And where does it say that, sir?

23 THE COURT: Let's let him answer the question.

24 A. The other reason is because he had a material amount of
25 accounts receivable and inventory.

1 BY MR. McCOLL:

2 Q. And where does it say that C Corporations are required to
3 use the accrual method?

4 A. Somewhere in Code Section -- I believe 446.

5 MR. McCOLL: May I approach the witness? It's a
6 short section.

7 THE COURT: If you have it in front of you, you don't
8 need to have him look at it, and if you have somebody else who
9 wants to deal with that subject if it's relevant at that time,
10 we'll deal with it at that time. Let's go on to something else
11 now. We've dealt with that enough now.

12 BY MR. McCOLL:

13 Q. If I told you there was no mention of C Corporations --

14 THE COURT: I said we've dealt with that enough now.
15 Let's go on to something else.

16 BY MR. McCOLL:

17 Q. With regard to the other reason besides the C Corporation
18 that you mentioned about inventory, et cetera, is that in a
19 different section of the Code?

20 A. I'm not sure where that is.

21 Q. Is it in the Code, in the Internal Revenue Code?

22 A. I don't know.

23 Q. And do you know the definition for "income" and where
24 that's located in the Internal Revenue Code?

25 THE COURT: That's outside the scope of the direct.

1 A. I don't know where it's located, no.

2 MR. McCOLL: Thank you, Your Honor.

3 THE COURT: Okay. Can he be excused as a witness?

4 MR. McCOLL: Subject to recall, Your Honor.

5 MR. KEMINS: Subject to recall.

6 THE COURT: Is he on your list?

7 MR. McCOLL: No, Your Honor.

8 THE COURT: Okay. Does the government want him to be
9 available for recall?

10 MR. KEMINS: Yes, sir.

11 THE COURT: Okay. You can step down, but you're
12 subject to possible recall by the attorney for the government.

13 Okay. Call your next witness.

14 MR. JARVIS: Your Honor, may I approach the bench,
15 please?

16 THE COURT: Yes.

17 (Bench conference with lead attorneys:)

18 MR. JARVIS: I'm concerned about the public out here
19 laughing and joking around and making comments based on the
20 witnesses and their testimony, and rulings of this Court. I'd
21 like the Court to instruct these people to keep their mouth
22 shut.

23 (End of bench conference.)

24 THE COURT: Okay. Let me have the jury go back to
25 the jury room just a minute.

1 (Jury out, 3:44 p.m.)

2 THE COURT: Okay. You can be seated.

3 This is directed to the persons in the audience. If we
4 have another outburst of laughter or any further comments aloud
5 during the course of the trial, the audience section of the
6 courtroom will be vacated. We cannot have that kind of
7 disruption in the trial process. So I'm alerting you all now
8 that if that occurs one more time, the entire audience section
9 of the courtroom will be vacated and you will not be allowed
10 back into the courtroom.

11 MR. JARVIS: Thank you, Your Honor.

12 THE COURT: Okay. Let's get the jury back.

13 MR. McCOLL: Your Honor, may we approach the bench?

14 THE COURT: Yes.

15 (Bench conference with lead attorneys:)

16 MR. McCOLL: In the prior trial there was a question
17 asked, "If an employer fails to collect and withhold the taxes,
18 does that place any financial burden on the employees of the
19 company," to this witness. He says, "Yes, sir." And then
20 Mr. Jarvis asked him, "Did you discuss this with Mr. Simkanin?"
21 He said, "I can't recall discussing that with Mr. Simkanin."
22 So we would object that it was not discussed with Mr. Simkanin;
23 therefore, it's irrelevant.

24 MR. JARVIS: I'm not going to go into that, Judge.

25 THE COURT: You don't plan to ask that?

1 MR. JARVIS: No, Your Honor.

2 THE COURT: Okay.

3 (End of bench conference.)

4 (Jury in, 3:48 p.m.)

5 THE COURT: You may proceed.

6 MR. JARVIS: Yes, Your Honor, at this time the
7 government would call Mr. Fred Taylor.

8 THE COURT: Okay. You can proceed.

9 FRED TAYLOR,

10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. JARVIS:

13 Q. Mr. Taylor, would you state your name for the record and
14 spell your last name.

15 A. Fred Taylor, T-A-Y-L-O-R.

16 Q. What is your occupation, sir?

17 A. I'm a CPA here in Fort Worth.

18 Q. Would you briefly tell us your background and education
19 and experience.

20 A. I have a BBA in accounting, I'm a CPA, and I've been in
21 public accounting about 30 years, 29 to 30 years.

22 Q. As a CPA, are you licensed by the State of Texas?

23 A. That's correct.

24 Q. The firm you're with is Simpson & Taylor; is that right?

25 A. That's correct.

- 1 Q. And how long have you been with that firm, sir?
- 2 A. We've been in existence about eight years.
- 3 Q. And prior to that, the name of the firm was?
- 4 A. Just Fred Taylor, CPA.
- 5 Q. Now, do you know Jim Kelly?
- 6 A. Yes, I do.
- 7 Q. Has he worked for your firm a number of years?
- 8 A. Yes.
- 9 Q. Are you familiar with the account or the client by the
10 name of Arrow Custom Plastics?
- 11 A. Yes.
- 12 Q. And has that been a customer or a client of your company
13 for a number of years?
- 14 A. Three or four years, I believe, yes.
- 15 Q. And did there come a time in approximately 1999/early 2000
16 when you had a conversation with Mr. Kelly about concerns about
17 Mr. Simkanin's decision about withholding taxes?
- 18 A. Yes.
- 19 Q. Do you recall about the first time you were aware this
20 might be an issue with Arrow Custom Plastics?
- 21 A. It was in '99, I believe, late '99/early 2000 sometime.
- 22 Q. Without going into the content of the conversation, did
23 you have conversations with Jim Kelly about this issue?
- 24 A. Yes, I did.
- 25 Q. Did there come a time, sir, in March of 2000 when you went

1 with Mr. Kelly to have a personal visit with Dick Simkanin?

2 A. Yes, sir.

3 Q. And do you see Mr. Simkanin in the courtroom?

4 A. Yes, sir, I do.

5 Q. Please point to him and describe where he's seated.

6 A. Mr. Simkanin is on my far right at the desk in front.

7 Q. With the blue tie there?

8 A. Blue tie.

9 THE COURT: He's identified the defendant.

10 MR. JARVIS: Thank you, Your Honor.

11 BY MR. JARVIS:

12 Q. Tell us the purpose of that visit, you and Mr. Kelly going
13 to visit Mr. Simkanin.

14 A. Well, Mr. Kelly had voiced concern about some comments
15 Mr. Simkanin was making about not withholding and not filing
16 tax returns, so we thought it was best to go hear what he had
17 to say.

18 Q. And was there anyone else present for the meeting other
19 than yourself, Mr. Kelly, and Mr. Simkanin?

20 A. No.

21 Q. And, again, a rough time frame would be early/mid-March
22 2000?

23 A. March 2000.

24 Q. About how much time did you spend with Mr. Simkanin?

25 A. I would say 30 to 45 minutes.

1 Q. Was that in his office?

2 A. That was in his office, yes, sir.

3 Q. Tell us what happened during that meeting, sir.

4 A. Mr. Simkanin informed us that he had quit withholding from
5 his employees and was not going to remit. He was not going to
6 file the tax returns we had prepared for him.

7 THE COURT: The personal tax return or corporate
8 taxes?

9 THE WITNESS: Both, sir. He wasn't going to file any
10 tax returns.

11 BY MR. JARVIS:

12 Q. And did he tell you why he felt -- he justified not
13 withholding taxes or filing corporate or personal returns?

14 A. He did not believe that the Internal Revenue Code applied
15 to him.

16 Q. Did he elaborate on why he felt the Internal Revenue Code
17 did not apply to him personally?

18 A. He quoted some parts of law, which I don't remember.

19 Q. Now, up to that time had Mr. Simkanin followed your advice
20 as his accounting firm?

21 A. Yes, sir.

22 Q. And what was your reaction when he said that was his plan?

23 A. I was surprised. We hear a lot of people say I'm not
24 going to do this and I'm not going to do that. When it comes
25 right down to it, though, they wind up doing what they should.

1 So I wanted to hear it.

2 Q. Now, the end of March, March 31st of 2000, would that have
3 been the last opportunity for Mr. Simkanin to file his 941s,
4 his withholding taxes, for the first quarter of 2000?

5 A. I don't recall, sir.

6 Q. I guess my question is: Why did you decide to go out in
7 March of 2000 as opposed to February or April or any other
8 time?

9 A. It was tax season and we were very busy.

10 Q. What was your response when he said the Internal Revenue
11 Code does not apply to me?

12 A. Well, I told him I thought it did and that he should file
13 the returns, and if he did not do so he was going to get in a
14 lot of trouble.

15 Q. What kind of trouble, sir?

16 THE COURT: Well, let's back up a minute.

17 Did you tell him what kind of trouble you thought he would
18 get in?

19 THE WITNESS: Yes, I believe I said criminal trouble.

20 BY MR. JARVIS:

21 Q. And did he respond to that when you said he could get into
22 criminal trouble if he persisted with his plan?

23 A. He persisted, yes, sir.

24 Q. Did he react in any way when you told him criminal
25 trouble?

1 A. No, sir.

2 Q. If taxes are due and payable and wages are taxable income,
3 would the defendant, as the owner of Arrow Custom Plastics, in
4 your judgment, be the responsible party to collect those taxes?

5 A. Yes, sir.

6 Q. After 30 or 45 minutes -- is that what you said the time
7 of the meeting?

8 A. Roughly.

9 Q. At the end of the meeting, did you make any headway in
10 convincing Mr. Simkanin to reconsider?

11 A. No, sir, I did not.

12 Q. So how did you leave it?

13 A. We left it that we were going to go back. Mr. Simkanin
14 asked -- I don't know why -- if we were going to continue to
15 work for him. I said I didn't know, and we left at that point.

16 Q. Let me direct your attention, Mr. Taylor, to Government's
17 Exhibit 3. I believe it's open in the book there.

18 A. Yes, sir.

19 Q. Would you identify that document, sir?

20 A. It's a letter I wrote March the 28th of 2000 to Mr. Dick
21 Simkanin.

22 Q. This appears to be a filed, unsigned copy. Was the copy
23 that was mailed to him actually signed with your signature?

24 A. Yes, sir, it was.

25 Q. Why was it sent to Mr. Simkanin, Mr. Taylor?

1 A. We were resigning the account. We were no longer going to
2 represent Mr. Simkanin.

3 MR. JARVIS: We would offer at this time Government's
4 Exhibit 3.

5 MR. McCOLL: No objection.

6 THE COURT: It's received.

7 BY MR. JARVIS:

8 Q. "March 28, 2000, Mr. Dick Simkanin, Arrow Custom Plastics,
9 Bedford Texas. Dear Dick: Inasmuch as your year-end of March
10 31st is approaching rapidly, I felt it necessary to contact you
11 regarding our future relationship.

12 "Due to differing opinions regarding certain business
13 practices, we believe it to be in both of our best interests
14 for you to obtain the services of another accounting firm for
15 your future requirements." And it goes on for another
16 paragraph or so.

17 Mr. Taylor, why did you consider it important for you to
18 disengage from representing Mr. Simkanin?

19 A. Because the ethics of my profession, the CPAs, and the
20 Internal Revenue Service say that I cannot be associated with
21 anything like that.

22 Q. Is the integrity and reputation of your firm important to
23 you, sir?

24 A. Yes, very.

25 Q. If you continue to represent Arrow Custom Plastics, would

1 that put the reputation of your firm at risk?

2 A. I believe it would have, yes, sir.

3 MR. JARVIS: One moment, please.

4 (Government counsel confer.)

5 MR. JARVIS: Pass the witness, Your Honor.

6 THE COURT: Do you have any questions for this
7 witness?

8 MR. McCOLL: Yes, I do, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. McCOLL:

11 Q. Good afternoon, Mr. Taylor.

12 A. Good afternoon.

13 Q. You said that the IRS wouldn't allow you to do -- to
14 participate in something like "this."

15 A. Yes, sir.

16 Q. What sanction could they bring against you that would make
17 you -- what enforcement power do they have against a private
18 CPA?

19 A. They have enforcement power to stop me from representing
20 people before the IRS.

21 Q. So if people don't file their --

22 THE COURT: I think he's answered the question.

23 Let's don't repeat it. He's answered the question.

24 MR. McCOLL: Yes, sir.

25 BY MR. McCOLL:

1 Q. So does that also apply to any other area other than not
2 withholding?

3 A. Yes, sir.

4 Q. Just basically when they're not -- there are a variety of
5 things they don't like, and when they say you can't do that,
6 they can enforce it by taking away your opportunity to appear
7 before them.

8 A. Are you talking about the Service only?

9 Q. Yes.

10 A. Yes.

11 Q. Okay. Now, isn't it true that under corporate -- with
12 regard to calculating the corporate earnings and profits that
13 there is income that's exempted by statute as well --

14 MR. JARVIS: Your Honor, we object. It's beyond the
15 scope of the direct.

16 THE COURT: That is beyond the scope of the direct.
17 I sustain the objection.

18 BY MR. McCOLL:

19 Q. Did you not testify you had a conversation with him about
20 his obligation to file a corporate return?

21 A. Yes.

22 Q. Are there exceptions under the Constitution for liability
23 for corporate income?

24 A. Exceptions under what, sir?

25 Q. Under the Constitution.

1 A. I have no idea.

2 MR. McCOLL: May I approach the witness?

3 THE COURT: No. We're not going to get into that at
4 this time.

5 BY MR. McCOLL:

6 Q. Do you consult the Code of Federal Regulations, 26 --

7 THE COURT: I think that's beyond the scope of the
8 direct.

9 BY MR. McCOLL:

10 Q. Could that have been the law that he was referring to that
11 you don't remember? Does that refresh your memory?

12 A. It does not.

13 Q. Now, in your letter that you sent him, I believe you
14 referred to Government's Exhibit 3, you talk about "differing
15 opinions"; is that correct?

16 A. That's correct.

17 Q. Do you often have differing opinions with CPAs, or are you
18 aware that there is a wide variety of differing opinions as to
19 the interpretation of the Internal Revenue Code?

20 A. There always is.

21 THE COURT: Did you have in mind a difference in
22 opinion between you and Mr. Simkanin, or your firm and
23 Mr. Simkanin?

24 THE WITNESS: No, sir.

25 THE COURT: In the letter?

1 THE WITNESS: No, sir.

2 THE COURT: Okay. Go ahead.

3 BY MR. McCOLL:

4 Q. There's nothing in your letter about criminality, is
5 there?

6 A. No.

7 Q. Did you tell him what specific authority, other than
8 sending -- You understood that your colleague had sent him a
9 fax about 3402, correct?

10 A. That's correct.

11 Q. Other than that, did you provide any specific authority to
12 him to show him that he was not exempt under the rules for
13 calculating gross income as a corporation?

14 A. Gross income as a -- I don't understand.

15 Q. Well, isn't it true that --

16 THE COURT: Did you call his attention to any laws or
17 regulations that supported whatever you were telling him?

18 THE WITNESS: I can do that.

19 Not specifically, no, sir. Just the Code in general.

20 BY MR. McCOLL:

21 Q. Just the Code in general?

22 A. Uh-huh, that's correct.

23 Q. Is it correct that with regard to the Code in general that
24 with regard to gross income that may consist of one or more
25 items that are excepted --

1 MR. JARVIS: Your Honor, we object. Beyond the scope
2 of direct. It's irrelevant.

3 THE COURT: That is beyond the scope of the direct.
4 We won't get into that at this time.

5 BY MR. McCOLL:

6 Q. How long did you discuss with Mr. Simkanin his
7 understanding of what he was trying to convey to you?

8 A. As I said, 35 to 45 minutes for the entire meeting.

9 Q. But you have no recollection of what he told you.

10 A. No, sir.

11 MR. McCOLL: Thank you.

12 THE COURT: Can this witness be excused?

13 MR. McCOLL: Could I have just a minute, Your Honor?

14 (Brief pause.)

15 THE COURT: Mr. Jarvis, can this witness be excused?

16 MR. JARVIS: Subject to recall, Your Honor.

17 THE COURT: Okay. You can step down. You're excused
18 for the time being, but you are subject to recall if the
19 government's attorney recalls you.

20 Call your next witness.

21 MR. KEMINS: We call Al Sharp, Your Honor.

22 Mr. McCOLL: Your Honor, could I approach the bench
23 on a housekeeping matter?

24 THE COURT: All right.

25 (Bench conference with lead attorneys:)

1 MR. McCOLL: I asked your bailiff about an hour and a
2 half ago if I could get some extra water, but I guess I asked
3 the wrong person. I should have asked the court personnel --

4 THE COURT: See if there's some water there.

5 MR. McCOLL: There is.

6 THE COURT: You can borrow that. Just take it.

7 MR. JARVIS: I'm running low, too.

8 (End of bench conference.)

9 THE COURT: Okay. You may proceed, Mr. Kemins.

10 MR. KEMINS: Thank you, Your Honor.

11 AL SHARP,

12 having been duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. KEMINS:

15 Q. Sir, could you give us your full name, spelling your last
16 name, please.

17 A. Al Sharp, S-H-A-R-P.

18 Q. And, Mr. Sharp, how are you employed?

19 A. I'm employed by the Texas Work Force Commission.

20 Q. What's your current position with the Texas Work Force
21 Commission?

22 A. I'm an accounts examiner.

23 THE COURT: Hold on just a minute. Let me interrupt.

24 (Court confers with secretary.)

25 THE COURT: I'm sorry for the interruption. Go

1 ahead.

2 MR. KEMINS: No problem, Your Honor. Thank you.

3 BY MR. KEMINS:

4 Q. You said you're employed by the Texas Work Force
5 Commission.

6 A. That's correct.

7 Q. And what's your position there?

8 A. Accounts examiner.

9 Q. And how long have you been employed with the Texas Work
10 Force Commission?

11 A. Over 32 years.

12 Q. And just briefly, what does the Texas Work Force
13 Commission do?

14 A. It collects an unemployment tax from employers in the
15 state of Texas.

16 Q. And what type of duties do you specifically have with the
17 Texas Work Force Commission?

18 A. I help in the collection of the unemployment tax. We
19 collect the quarterly reports and the tax.

20 Q. And that's from employers?

21 A. That's correct.

22 Q. Now, let me ask you this: In your work with the Texas
23 Work Force Commission, did you have any role whatsoever in the
24 criminal investigation of Mr. Simkanin?

25 A. No, sir.

1 Q. Have you, in fact, ever met Mr. Simkanin?

2 A. No, sir.

3 Q. In a book in front of you there's a group of exhibits,
4 Government's Exhibits 14 through 50. Could I get you to flip
5 through those real quick.

6 A. You want me to look through each one of them?

7 THE COURT: Have you already looked at those?

8 THE WITNESS: Yes, sir, I have.

9 THE COURT: There's no point in him taking the time
10 to study them again --

11 MR. KEMINS: Fourteen through 51, Your Honor.

12 THE COURT: Pardon me. We can't talk at the same
13 time, Mr. Kemins.

14 I was saying there's no point in him looking at them again
15 if he's already looked at them.

16 MR. KEMINS: Yes, Your Honor.

17 BY MR. KEMINS:

18 Q. Mr. Sharp, Government's Exhibits 14 through 51, are those
19 official records of the Texas Work Force Commission?

20 A. They are.

21 MR. KEMINS: Your Honor, at this point we would move
22 Government's Exhibits 14 through 51 into evidence.

23 THE COURT: They're received.

24 BY MR. KEMINS:

25 Q. Now, the Texas Work Force Commission, what types of

1 reports does it require from employers in Texas?

2 A. It requires a quarterly report that's filed four times a
3 year.

4 Q. What type of information do you ask the employers to
5 furnish you with?

6 A. The main information on the report is the total wages paid
7 to all the employees during that particular calendar quarter as
8 well as the taxable wages.

9 Q. Government Exhibit 16, if you could turn to that real
10 quick.

11 A. (Witness complies.)

12 Q. Is that an example of one of these employer quarterly
13 reports you were talking about?

14 A. It is.

15 Q. And this one is for Simkanin, Incorporated/Arrow Custom
16 Plastics in Bedford, Texas; is that correct?

17 A. That's correct.

18 Q. Now, within 14 through 51, there are other reports such as
19 this; is that correct?

20 A. That's correct.

21 Q. As you said, all of them ask for this wage information
22 from the employer; is that correct?

23 A. That's correct.

24 Q. Does it also ask for an employee's social security number?

25 A. It does.

1 Q. And the employee's name?

2 A. It does.

3 Q. And the wages that are paid.

4 A. That's correct.

5 Q. Now, if I could have you turn back to look at Government

6 Exhibit 15, please.

7 THE COURT: Let me interrupt you a minute. What were
8 the series of exhibits that you just offered and that were
9 received? It was Exhibits 14 through -- what was the end
10 number?

11 MR. KEMINS: Fifty-one, Your Honor.

12 THE COURT: Fifty-one?

13 MR. KEMINS: Yes, sir.

14 THE COURT: Okay. Go ahead.

15 BY MR. KEMINS:

16 Q. What is Government Exhibit 15?

17 A. It's a list of the wages taken from the reports that
18 Simkanin, Incorporated, submitted to the Texas Work Force
19 Commission.

20 THE COURT: Is Simkanin, Incorporated, just another
21 name for Arrow Custom Plastics?

22 THE WITNESS: Yes, sir, it's the legal entity. Arrow
23 Custom Plastics is a d/b/a.

24 THE COURT: That's the name that --

25 THE WITNESS: Doing business as.

1 THE COURT: -- a company by the name of Simkanin,
2 Inc., does business by?

3 THE WITNESS: Yes, sir. That's what they did
4 business by here in this third quarter of '99.

5 THE COURT: Okay. Go ahead.

6 MR. KEMINS: Thank you, Your Honor.

7 BY MR. KEMINS:

8 Q. Government Exhibit 15, that's prepared by the Texas Work
9 Force Commission?

10 A. That's correct.

11 Q. From information provided by the employer.

12 A. That's correct.

13 Q. I ask you to turn to Government Exhibit 30, please.

14 Government 30 is another one of these quarterly reports for
15 Simkanin, Incorporated. It looks like for the periods April
16 and May of 2001; is that correct?

17 A. Well, it's for the second quarter 2001. That's April,
18 May, June. That's correct.

19 Q. Now, I would ask you to turn to Government Exhibit 33,
20 please.

21 A. (Witness complies.)

22 Q. Government Exhibit 33 is for the same period but now it
23 says Dick Simkanin/Arrow Custom Plastics; is that correct?

24 A. That's correct.

25 Q. So at some point Simkanin, Incorporated, went away and

1 Dick Simkanin started reporting for Arrow Plastics; is that
2 correct?

3 A. That's correct. From looking at these reports, that's
4 what appears to have happened.

5 Q. Now, regardless of the formation, whether it's a
6 corporation, sole proprietorship, it's still required to file
7 these reports with the state if it has employees; is that
8 correct?

9 A. That's correct.

10 Q. Now, when we met prior, did I ask you to match up the
11 wages listed in the quarterly reports filed by either Simkanin,
12 Incorporated, or Dick Simkanin as Arrow Plastics with the
13 periods alleged in Counts 1 through -- Hold on a second here --
14 1 through 12 of the government's indictment?

15 A. You did.

16 Q. And under the column "total wages subject to collection,"
17 did they match up with what was filed with the Texas Work Force
18 Commission?

19 A. They did.

20 Q. Let me ask you this: The Texas Work Force Commission,
21 that's a state entity; is that correct?

22 A. That's correct.

23 Q. Where does the Texas Work Force Commission receive most of
24 its funding for its daily operations?

25 A. The federal government.

1 Q. Thank you.

2 MR. KEMINS: I have no further questions, Your Honor.

3 THE COURT: Okay. Does the defendant have any
4 questions?

5 MR. McCOLL: Yes, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. McCOLL:

8 Q. So as I understand it, sir, Arrow Custom Plastics never
9 stopped following the legally required quarterly reporting with
10 regard to the wages paid to their workers; is that correct?

11 A. That is correct.

12 THE COURT: You mean to the Texas Work Force
13 Commission as opposed to some other agency?

14 MR. McCOLL: To the Texas Work Force Commission.

15 THE WITNESS: That's correct, for this time period.

16 BY MR. McCOLL:

17 Q. Yes, sir. Now, you talked about taxable wages. I take it
18 that all wages are not taxable; is that correct?

19 A. That's correct.

20 Q. You also mentioned that this -- you retrieve a social
21 security number from workers. You're not suggesting that each
22 worker is legally required to have a social security number,
23 are you?

24 MR. KEMINS: Objection, beyond the scope, Your Honor.

25 THE COURT: That's beyond the scope of the direct.

1 You don't need to answer that. I sustain the objection.

2 MR. McCOLL: Thank you, sir.

3 MR. KEMINS: Subject to recall, Your Honor.

4 THE COURT: Okay. You're excused now. You can step
5 down, but you might be recalled so you'll have to stand back.

6 Okay. Call your next witness.

7 MR. KEMINS: We call Robert Dean, Your Honor.

8 THE COURT: You may proceed.

9 MR. KEMINS: Thank you, Your Honor.

10 ROBERT DEAN,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. KEMINS:

14 Q. Could you give us your full name, spelling your last name,
15 please.

16 A. Robert Dean, D-E-A-N.

17 Q. And, Mr. Dean, how are you employed?

18 A. With the Internal Revenue Service.

19 Q. What's your current position with the Internal Revenue
20 Service?

21 A. The custodian of records.

22 Q. And how long have you been with the IRS?

23 A. I've been with the IRS about 17 years.

24 Q. What specifically, and briefly, does your job entail with
25 the IRS?

1 A. Mainly my job consists of researching accounts, helping
2 produce documents for trial, preparing transcripts for trial,
3 and then testifying in trials.

4 Q. Now, in your duties with the IRS, did you have any role
5 whatsoever in the criminal investigation of Mr. Simkanin?

6 A. No, I did not.

7 Q. As part of your duties, did you have occasion to search
8 IRS records for the records of Arrow Custom Plastics?

9 A. Yes, I did.

10 Q. Did you also search for records for an individual named
11 Richard Simkanin?

12 A. Yes, I did.

13 Q. And how did you conduct this search?

14 A. I used the IRS computer to research through using the
15 social security number for Mr. Simkanin and the employer
16 identification number for Arrow Plastic.

17 Q. Now, I forget what you said. Where are you stationed with
18 the IRS?

19 A. I'm from Austin, Texas.

20 Q. When you searched the IRS computers, did you just search
21 computers in Austin, or did you search all over the country?

22 A. No. Our computer records search for any filings or
23 anything made from across the country.

24 Q. Now, you're going to be talking about some forms in your
25 testimony. Just to go over them briefly, what is a Form 941?

1 A. A Form 941 is what employers use to quarterly report wages
2 that they pay to their employees, income tax withholding from
3 their employees' paychecks, social security, Medicare/Medicaid
4 withholding, plus the employer's part of Medicare/Medicaid and
5 social security in order to pay in the money that they had
6 withheld from the employees' wages.

7 Q. Now, what is a Form 940-EZ?

8 A. A Form 940-EZ is a short form of a Form 940, and a Form
9 940 is for the federal unemployment tax. And that's where an
10 employer reports certain wages and pays in unemployment tax to
11 cover any claims against the company from employees that no
12 longer work there.

13 Q. And, finally, what's a Form 1040?

14 A. A Form 1040 is what an individual uses to report their
15 income from any -- many sources and any kind of deductions to
16 come up with a tax due.

17 Q. Now, you mentioned in your testimony you used the term
18 "transcript"?

19 A. A transcript is a statement of account for an individual
20 or a business for a particular tax period -- what we would call
21 a tax period or a tax year.

22 Q. And how is a transcript created?

23 A. A transcript can be created -- I can order it through the
24 computer where it's generated. Or if it's not available, I can
25 have someone else manually do a transcript.

1 Q. Now, in front of you there is a binder which contains
2 Government's Exhibits 52 through 90. Now, prior to coming into
3 court today, have you reviewed Government's Exhibits 52 through
4 90?

5 A. Yes, I did.

6 Q. And are these records official records of the Internal
7 Revenue Service?

8 A. Yes, they are.

9 MR. KEMINS: Your Honor, at this point we would move
10 Government's Exhibits 52 through 90 into evidence, please.

11 THE COURT: They're received.

12 BY MR. KEMINS:

13 Q. Now, talking first about the block of exhibits that start
14 with Exhibit 52 and go to Government Exhibit 63, and you've
15 looked at these before. What are they?

16 A. These are certified copies of Form 941s. These are
17 employer's quarterly federal tax returns, and they cover from
18 the first quarter of tax year 1997 -- In other words, March of
19 '97 through the fourth quarter of 1999.

20 Q. And are these forms for Simkanin, Incorporated, which did
21 business as Arrow Custom Plastics?

22 A. Yes, they are.

23 Q. Now, if we look at the group of exhibits that start with
24 Government Exhibit -- Now, these exhibits that we just talked
25 about, 52 through 63, they show a prior history of withholding

1 and filing 941s on the part of Arrow Custom Plastics; is that
2 correct?

3 A. Yes. These show wages reported -- or they're reporting
4 wages and they're reporting withholding and social security and
5 Medicare wages and withholding.

6 Q. Now, talking about the group of exhibits that start with
7 Government Exhibit 64 and go to Government Exhibit 78, and you
8 reviewed those before. What are those?

9 A. These are transcripts of account for Simkanin,
10 Incorporated/Arrow Custom Plastics; and these are certified
11 transcripts for the 941 accounts.

12 Q. And what do these transcripts show?

13 A. These show for the quarters starting with March of 2000
14 through September of 2003, that no return has been filed with
15 the IRS, there's been no money paid in for money withheld from
16 any employee's paychecks, and there's nothing that the IRS has
17 received.

18 Q. And, again, this is from your search of IRS records
19 nationwide; is that correct?

20 A. That's correct.

21 Q. Now, did I ask you with Government's Exhibits 64 through
22 78 to match them up for the tax quarter ending dates that is
23 listed in Counts 1 through 12 of the indictment?

24 A. Yes, you did.

25 Q. And do they match up with what's been -- what periods are

1 included in the indictment?

2 A. Yes, they match.

3 Q. Now, if we could turn to the block of exhibits that begin
4 with Government Exhibit 83 and go through Exhibit 90. And
5 we're going to do this just a little bit out of order. I
6 apologize. Eighty-three through 90.

7 A. Okay.

8 Q. And what are these exhibits?

9 A. These are certified transcripts for Richard Simkanin or
10 Richard and Carole simkanin for their individual tax returns,
11 and they start with the 1988 tax year and go through 1995.

12 Q. So these exhibits indicate a history of filing of personal
13 income tax returns by the defendant.

14 A. Yes. These show income -- the transcripts will show
15 adjusted gross income, say, for instance, in 1988 of \$107,000.
16 It shows that a return was filed and a tax assessed of \$26,320
17 and that that tax had been paid.

18 Q. Okay. Now, if we turn back to the group of exhibits that
19 begin with Government Exhibit 79 and going through Government
20 Exhibit 82.

21 A. (Witness complies.)

22 Q. And what are those?

23 A. These are certified transcripts for Richard and Carole
24 Simkanin.

25 Q. And what do they show?

1 A. These show that no return has been filed for tax periods
2 1998, 1999, 2000, or 2001.

3 Q. And these are the same periods alleged in Counts 28
4 through 31 of the indictment; isn't that correct?

5 A. That's correct.

6 MR. KEMINS: I have no further questions, Your Honor.
7 Pass the witness.

8 THE COURT: Do you have any questions of this
9 witness?

10 MR. McCOLL: Briefly, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. McCOLL:

13 Q. Sir, you do not have to file returns in the future.

14 MR. KEMINS: Objection, Your Honor, beyond the scope.

15 THE COURT: It's beyond the scope of the direct.

16 BY MR. McCOLL:

17 Q. With regard to the 94 --

18 THE COURT: Pardon me. I sustained the objection.
19 Go on to another question.

20 MR. McCOLL: Could I have the answer for the bill?

21 THE COURT: Go on to another question now. We can
22 take that matter up at an appropriate time.

23 BY MR. McCOLL:

24 Q. You're not a CPA, are you, sir?

25 A. No.

1 MR. McCOLL: Thank you.

2 THE COURT: Okay. Can this witness be excused?

3 MR. KEMINS: Subject to recall, Your Honor.

4 MR. McCOLL: Your Honor, I do have --

5 THE COURT: Okay. You can --

6 MR. McCOLL: Excuse me, Your Honor. I was just
7 handed a question, if you don't mind.

8 THE COURT: Okay. Go ahead.

9 BY MR. McCOLL:

10 Q. As custodian of the records, your job primarily is to come
11 to court and bring records; is that correct?

12 A. Yes.

13 Q. So you do this frequently?

14 A. Uh, this --

15 THE COURT: I'm sorry. I didn't hear the question.

16 BY MR. McCOLL:

17 Q. You do this frequently?

18 A. Sometimes. It depends upon the court calendars in my
19 area.

20 Q. Yes, sir. Thank you.

21 THE COURT: Okay. You can step down. You're
22 excused, but you're subject to recall by the government, if the
23 government needs you again.

24 Okay. Why don't we -- How many more witnesses does the
25 government have?

1 MR. KEMINS: We have six more, Your Honor.

2 MR. JARVIS: Six more, Your Honor.

3 THE COURT: I guess we'd better take a recess.

4 Why don't we take a recess to -- a 15-minute recess. And
5 I'm anticipating -- Obviously, we're not going to finish today,
6 but I'm anticipating we might work until around 6:30 and move
7 along and then recess until 8:30 in the morning, so you can
8 know what my plans are.

9 Let me ask, before the jury leaves: Is that timing going
10 to create a problem with anybody? I indicated when we started
11 that we might work late some days, but it's not essential that
12 we work as late as I've indicated today. So if that timing has
13 created a problem, somebody raise your hand and tell me. If
14 not, I would like to go ahead and work until 6:30 so we can
15 move on that far.

16 (Juror No. 5 raises hand.)

17 THE COURT: Okay. I don't see -- Oh, you have a hand
18 raised?

19 JUROR NO. 5: I have a 7:00 o'clock appointment that
20 I would like to try to keep. It's about 30 minutes away.

21 THE COURT: Okay. If we work until 6:15, will that
22 do it?

23 JUROR NO 5: Yes, that's good.

24 THE COURT: And for the record, you're --

25 JUROR NO. 5: Five.

1 THE COURT: -- Juror five. Okay. Very good. We'll
2 work until 6:15.

3 (Court in recess, 4:24 p.m. until 4:44 p.m.)

4 THE COURT: Okay. You may proceed, Mr. Jarvis.

5 MR. KEMINS: I'll have this witness, Your Honor, and
6 we'd call Joe Wayne Cooper to the stand, Your Honor.

7 THE COURT: Okay. You may proceed.

8 MR. KEMINS: Thank you, sir.

9 JOE WAYNE COOPER,

10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. KEMINS:

13 Q. For the record, could you give us your full name, spelling
14 your last name, please.

15 A. Joe Wayne Cooper, C-O-O-P-E-R.

16 Q. Mr. Cooper, how are you employed?

17 A. I'm an internal revenue agent with the Internal Revenue
18 Service.

19 Q. And what is your current duty with the Internal Revenue
20 Service?

21 A. I'm an employment tax specialist.

22 Q. And how long have you been employed with the Internal
23 Revenue Service?

24 A. Since January 1988.

25 Q. And as title "employment law specialist," how long have

1 you been in that position?

2 A. Since July of 2000.

3 Q. Could you briefly describe your duties as a revenue
4 agent/employment law specialist, please.

5 A. As an employment tax specialist, I review employment tax
6 returns, Forms 941/940. We conduct examinations of those
7 returns when necessary. We also review claims for refund.

8 Q. Now, as part of your duties, were you assigned to review a
9 claim for refund submitted by the defendant, Mr. Simkanin?

10 A. Yes, sir.

11 Q. Now, in front of you should be a book, and the first
12 exhibit should be Government Exhibit 91.

13 A. (Witness complies.)

14 Q. Do you see that exhibit?

15 A. Yes, sir.

16 Q. And we met prior to you coming into court today; is that
17 correct?

18 A. Yes, sir.

19 Q. As part of that, did you review Government's Exhibits 91
20 through 106?

21 A. Yes, sir.

22 Q. And are those official records of the Internal Revenue
23 Service?

24 A. Yes, sir, they are.

25 Q. In fact, is that taken together, Government Exhibits 91

1 through 106, is that the claim for refund Mr. Simkanin
2 submitted?

3 A. Yes, it is.

4 MR. KEMINS: Your Honor, at this time we'd move into
5 evidence Government's Exhibits 91 through 106, please.

6 THE COURT: They're received.

7 MR. KEMINS: Thank you, sir.

8 BY MR. KEMINS:

9 Q. If you can recall, when were you assigned to review
10 Mr. Simkanin's claim for refund?

11 A. In August 2000.

12 Q. And what steps did you take in reviewing this claim?

13 A. When I first received the file that had the claim, I
14 reviewed all the information in it, including the exhibits that
15 were mentioned earlier, the Forms 941/940, other attachments
16 that were included in the case file.

17 Q. Now, in your time with the IRS, have you reviewed other
18 claims for refunds before?

19 A. Yes, sir.

20 Q. And did you treat this claim for refund for Mr. Simkanin,
21 did you treat it any differently than any other claim?

22 A. No, sir.

23 Q. Now, Government Exhibit 91, it is a certified mail letter
24 that says, "Transmittal of documents. Gentlemen, enclosed
25 you'll find for Year ending December 31st, 1997," and then it

1 lists a number of exhibits. Then it says for the year ending
2 December 31st, 1998, and it lists seven classes of exhibits.
3 And then for the year ending December 31st, 1999, it lists four
4 classes of exhibits; is that correct?

5 A. Yes, sir.

6 Q. And this letter is signed by Richard Simkanin, President,
7 Arrow Custom Plastics?

8 A. Yes, sir.

9 Q. Now, there's a document behind it, is that correct, also
10 dated 28 January 2000?

11 A. Yes, sir.

12 Q. And that's to the United States Department of Treasury,
13 Internal Revenue Service in Austin, and attention --

14 THE COURT: You don't need to go through him to read
15 the document.

16 MR. KEMINS: Yes, sir.

17 THE COURT: If you want to read the document, just
18 read the documents without asking him if it's right.

19 MR. KEMINS: Yes, Your Honor.

20 THE COURT: They're in evidence.

21 MR. KEMINS: Yes, sir.

22 It's a letter dated 28 January 2000 to the U.S. Department
23 of Treasury, attention of District Director.

24 BY MR. KEMINS:

25 Q. And this was also part of the claim for refund that you

1 reviewed; is that correct?

2 A. Yes, sir.

3 MR. McCOLL: What number is that?

4 MR. KEMINS: It's 91.

5 BY MR. KEMINS:

6 Q. Now, it looks like in here that Mr. Simkanin cited some
7 court cases and some sections of the Internal Revenue Code; is
8 that correct?

9 A. Yes, sir.

10 Q. Now, when you reviewed this claim, did you review what he
11 put in this letter?

12 A. Yes, sir, I did.

13 Q. After you reviewed all of this, did you reach a conclusion
14 as to whether this refund should be granted or not?

15 A. I did.

16 Q. And what was your conclusion?

17 A. Concluded that the refund had no merit and the claim would
18 be denied in full.

19 Q. And did you inform Mr. Simkanin of this decision?

20 A. Yes, I did.

21 Q. And did you actually have any conversations with
22 Mr. Simkanin about this decision?

23 A. Yes, I did.

24 Q. Were these in person?

25 A. They were over the telephone.

1 Q. And what, if you recall, did you tell Mr. Simkanin?

2 A. I informed Mr. Simkanin that after reviewing the
3 information that he provided I denied his claim in full. I
4 also told him that the courts have consistently ruled against
5 this type of position that he was taking in regards to seeking
6 refunds of payroll taxes.

7 Q. And did you tell him anything -- Did you express any
8 opinion about some of the court cases or other legal areas he
9 put in that letter?

10 A. Not that I recall.

11 Q. Now, when you told Mr. Simkanin that his claim was being
12 denied, did he ask you any questions about that?

13 A. No, sir.

14 Q. Did he ask you to provide him with whatever information
15 you were basing your answer on?

16 A. No, sir.

17 Q. And did he offer to send you any other additional
18 information?

19 A. No, sir.

20 Q. Did he try to argue with you, anything from Section 3402
21 of the income tax code?

22 A. No, sir.

23 Q. Did he try to argue with you that there was no reason for
24 anybody to have a social security number?

25 THE COURT: I think he's already answered in a

1 general way what you're asking him specifically.

2 MR. KEMINS: Yes, sir.

3 THE COURT: Let's don't ask him the same thing two or
4 three different ways.

5 BY MR. KEMINS:

6 Q. Did he ask you to provide any court cases, or things like
7 that, that you were relying on?

8 A. No, sir.

9 Q. Now, did you discuss with him specifically how courts had
10 viewed the position he had taken in his letter?

11 MR. McCOLL: Objection. Asked and answered.

12 THE COURT: I think he's answered that. He's already
13 said that he told him the courts have consistently denied his
14 position.

15 BY MR. KEMINS:

16 Q. Now, as an employment law specialist you also understand
17 how to calculate employers' shares of the withholding taxes; is
18 that correct?

19 A. Yes, sir.

20 Q. At our request in our prior meeting, did you look at
21 Counts 1 through 12 of the indictment, specifically the "taxes
22 not collected" column?

23 A. Yes, sir.

24 Q. And did you match that calculation up with the "total
25 wages subject to collection" column?

1 A. Yes, sir.

2 Q. And are those, in your opinion, correct figures?

3 A. Yes, sir.

4 Q. Now, also in looking at this claim and what was submitted,
5 did you compare that to the form submitted and the periods
6 ending and the refund amount in Counts 13 through 27 of the
7 indictment?

8 A. Yes, sir.

9 Q. And do they match up with what Mr. Simkanin asked for a
10 refund on?

11 A. Yes, sir.

12 MR. KEMINS: I have no further questions, Your Honor.
13 Pass the witness.

14 THE COURT: Do you have any questions of this
15 witness?

16 MR. McCOLL: Yes, Your Honor, I do.

17 CROSS-EXAMINATION

18 BY MR. McCOLL:

19 Q. Good afternoon, sir. Is it correct that if Arrow Custom
20 Plastics' corporate income was exempt from taxation, then --

21 MR. KEMINS: Objection, Your Honor, beyond the scope.

22 THE COURT: Pardon me. That's beyond the scope.

23 BY MR. McCOLL:

24 Q. Then --

25 THE COURT: That's beyond the scope.

1 MR. McCOLL: May I finish my question for the record?

2 THE COURT: I understand what your question is,

3 Mr. McColl, and it's beyond the scope of the direct. So go on

4 to another question.

5 BY MR. McCOLL:

6 Q. You determined this was an invalid request for a refund.

7 A. Yes, sir.

8 Q. If it had been exempted income, it would have been a valid

9 request.

10 MR. KEMINS: Same objection, Your Honor.

11 THE COURT: I'll let him answer that. If it had been

12 exempted income, I'll let him answer that.

13 A. Would you repeat. I don't understand.

14 THE COURT: If it was exempted income, would it have

15 been a valid request?

16 THE WITNESS: If it was exempted income?

17 THE COURT: You mean, if he didn't have -- I'm not

18 sure --

19 THE WITNESS: I don't understand the question. I'm

20 sorry.

21 THE COURT: -- doesn't have any income, Mr. McColl?

22 Restate your question.

23 BY MR. McCOLL:

24 Q. Well, don't the CFRs provide that some income is exempted

25 by statute and also under the Constitution as to corporate

1 returns?

2 MR. KEMINS: We're going to object to that question,
3 Your Honor. That's beyond the scope.

4 THE COURT: Well, that is beyond the scope of the
5 direct. I think you've dealt with that enough. It really ends
6 up just being an argument, Mr. McColl. Go on to something
7 else.

8 MR. McCOLL: Well, Your Honor, if the Court please --

9 THE COURT: Go to something else at this time.

10 BY MR. McCOLL:

11 Q. When you made your evaluation, did you base it on the Code
12 of Federal Regulations under Chapter 26?

13 A. Yes, sir.

14 Q. And was part of that to analyze his letter, which is
15 Government's Exhibit 91?

16 A. Yes, sir.

17 Q. Okay. And did you look at the citations that he provided?
18 Let me see if we're on the same page here. This is a six-page
19 letter --

20 THE COURT: Mr. McColl, let me have you and
21 Mr. Kemins come up here.

22 (Bench conference with Mr. Kemins and Mr. McColl:)

23 THE COURT: Mr. McColl, what you're, in effect, doing
24 is cross-examining to the end of proving that he was wrong in
25 his conclusion, which means you're trying to prove that the law

1 is not what the law is. And I'm not going to permit that kind
2 of cross-examination. The law is what the law is.

3 MR. McCOLL: Fine, Judge, but how about a valid, you
4 know, point that he could say, look, I'm wrong but it was not
5 totally unreasonable.

6 THE COURT: If your client wants to make that point
7 when he's on the stand, he can.

8 MR. McCOLL: Well, why can't I get him to say --

9 THE COURT: But we're not to that point yet.

10 MR. McCOLL: Can't I get him to go there, too?

11 THE COURT: No, we're not going to go through that
12 with this witness.

13 MR. McCOLL: Judge, you're cutting off my right to
14 cross-examine the most critical witness in the case.

15 THE COURT: Well, your cross-examination is directed
16 to lead the jury to believe that there might be something about
17 the Code that caused him not to be required to make those
18 payments.

19 MR. McCOLL: All right. I won't --

20 THE COURT: And I'm not going to permit that.

21 MR. McCOLL: I won't do that.

22 THE COURT: Okay. Well, you can go back. Don't
23 proceed in that direction whatsoever.

24 (End of bench conference.)

25 BY MR. McCOLL:

1 Q. Is it your practice or the policy of the IRS when you're
2 rejecting a claim from a citizen to cite cases, legal cases, if
3 they have cited cases?

4 A. Not necessarily.

5 Q. Did you have any Supreme Court cases that you could have
6 cited if you wanted to?

7 THE COURT: That's beyond the scope of the direct.
8 We're not going into that area.

9 BY MR. McCOLL:

10 Q. Well, I know you said that you --

11 THE COURT: Pardon me. Go on to something else.

12 BY MR. McCOLL:

13 Q. When you said that the cases were against him, were you
14 referring to any Supreme Court case?

15 A. I don't recall referring to a Supreme Court case.

16 Q. You would agree the Supreme Court is the law of the land.

17 MR. KEMINS: Objection, Your Honor.

18 THE COURT: I'll sustain that objection.

19 BY MR. McCOLL:

20 Q. Assuming that Mr. Simkanin is incorrect in his claim for
21 this refund, is it correct that CFRs do provide, both by
22 statute and Constitution, that some corporate income is exempt?

23 MR. KEMINS: Objection, Your Honor. That's beyond
24 the scope of the direct.

25 THE COURT: That's beyond the scope of the direct.

1 I'll sustain that objection.

2 BY MR. McCOLL:

3 Q. How many telephone conversations did you have with

4 Mr. Simkanin, sir?

5 A. Two.

6 Q. And could you tell us how long each one was?

7 A. I cannot tell you exactly, no, sir.

8 Q. Approximately?

9 A. I do not recall.

10 Q. Do you have any records to reflect that?

11 A. I don't record time limits.

12 Q. Okay. There is no requirement that you make a record by

13 the IRS?

14 MR. KEMINS: He answered that.

15 MR. McCOLL: That's a different question, Your Honor.

16 THE COURT: I'm going to sustain that objection.

17 He's already indicated he does not record time.

18 BY MR. McCOLL:

19 Q. So you don't have any recollection today at all how long

20 you talked to Mr. Simkanin.

21 THE COURT: I think he's already answered that

22 question, Mr. McColl. Do you have any other questions?

23 MR. McCOLL: I've forgotten the answer.

24 THE COURT: He's answered the question he does not

25 recall the time.

1 BY MR. McCOLL:

2 Q. Do you remember how far apart the conversations were that
3 you had with him?

4 A. No, sir, I don't.

5 Q. Do you remember what year they occurred in?

6 A. 2000.

7 Q. And did you call him or did he call you?

8 A. I called him.

9 Q. Okay. Now, in order to reject this claim, you've got to
10 do somewhat of a calculation on your own, do you not?

11 A. Yes, sir.

12 Q. And did you do a calculation with regard to his returns?

13 A. Calculation of what?

14 Q. For example, the gross income that was involved in the
15 taxable income.

16 A. He wasn't -- there was no calculation involved in gross
17 income. He was seeking a refund of taxes already paid.

18 Q. Right. But wouldn't it be appropriate to see if in
19 calculating the gross income there had been classes of
20 excludable income that weren't excluded?

21 MR. KEMINS: Objection, Your Honor.

22 THE COURT: The claims were for withholding that had
23 already been paid; is that correct?

24 THE WITNESS: Yes, sir.

25 THE COURT: Gross income doesn't have anything to do

1 with that, though.

2 THE WITNESS: Gross income has absolutely nothing to
3 do with it.

4 THE COURT: Okay. Let's get on to something that's
5 relevant to his testimony, Mr. McColl. Gross income doesn't
6 have anything to do with that.

7 MR. McCOLL: Well, maybe I'm confused, Your Honor,
8 but --

9 THE COURT: Well, just go on and ask a question even
10 if you are, and we'll see how to deal with it.

11 BY MR. McCOLL:

12 Q. If his accountant or his bookkeeper had made a
13 determination of gross income that was incorrect and included
14 excludable income --

15 MR. KEMINS: Objection, Your Honor. That's beyond
16 the scope.

17 MR. McCOLL: It's in the heart of the scope, Your
18 Honor.

19 THE COURT: Well, it's nonsensical, so I'm going to
20 sustain the objection on that ground, since gross income
21 doesn't have anything to do with what he was dealing with.

22 BY MR. McCOLL:

23 Q. Is it true that there are certain items within the class
24 of gross income that may be excluded income?

25 MR. KEMINS: Objection, Your Honor. That's beyond

1 the scope.

2 THE COURT: Let me be sure I understand the witness's
3 testimony. Does gross income have anything to do with your
4 determinations?

5 THE WITNESS: No, sir. I'm dealing with wages paid,
6 not gross income.

7 THE COURT: Okay. So let's go on to some other
8 subject. Let's drop gross income because it doesn't have
9 anything to do with his testimony, and therefore it would
10 certainly be beyond the scope of the direct.

11 BY MR. McCOLL:

12 Q. Did you have any conversations with Mr. Simkanin about his
13 not filing any returns?

14 A. Yes, sir.

15 Q. What was the nature of the conversation?

16 A. I asked him why he hadn't filed any employment tax
17 returns, forms 941/940.

18 Q. And did he go over some of the items in this multi-page
19 letter with you to try to explain what his position was?

20 A. To the best of my recollection, the only thing we
21 discussed was the fact that he believed he didn't have to
22 withhold payroll taxes from his employees' wages.

23 Q. Okay. In the process, did he explain to you that his
24 understanding of the definition of income was that it was
25 profit separated from capital --

1 THE COURT: I think that's beyond the scope of the
2 direct.

3 MR. McCOLL: I was asking what their conversation
4 was.

5 THE COURT: I'm telling you that's beyond the scope
6 of the direct.

7 BY MR. McCOLL:

8 Q. Did you tell him what income was?

9 THE COURT: That's beyond the scope of the direct.
10 Do you have anything else you want to ask the witness?

11 BY MR. McCOLL:

12 Q. How was it that you knew that courts -- or lower courts --
13 you said you didn't have any Supreme Court opinions -- that
14 lower courts, not the law of the land, had ruled --

15 MR. KEMINS: Objection to the form of the question.
16 Argumentative.

17 THE COURT: And I sustain the objection. Rephrase
18 the question.

19 BY MR. McCOLL:

20 Q. How was it that you knew that some lower courts had ruled
21 against his position?

22 A. Because I've dealt with cases of this type in the past,
23 and I've done research.

24 Q. You've dealt with many or few cases in the past?

25 A. Few.

1 Q. Just a few? And did you read any Fifth Circuit cases
2 about this?

3 A. I don't recall.

4 MR. KEMINS: Objection, Your Honor. It's way beyond
5 the scope.

6 THE COURT: I sustain the objection.

7 BY MR. McCOLL:

8 Q. Do you understand --

9 THE COURT: I sustain that objection. Let's don't
10 delve further into the issue of what courts have decided.
11 That's been dealt with enough.

12 MR. McCOLL: May I ask if he knows what
13 jurisdiction --

14 THE COURT: No. I think it's been dealt with enough.
15 Go on to another subject.

16 BY MR. McCOLL:

17 Q. Did he explain to you that he understood that social
18 security was not a mandatory system that you had to participate
19 in?

20 A. We did not talk about social security.

21 Q. But is that your understanding, that it's voluntary?

22 MR. KEMINS: Objection, Your Honor.

23 THE COURT: I sustain the objection.

24 BY MR. McCOLL:

25 Q. Within the scope of your expertise as an employment

1 specialist, do you --

2 MR. KEMINS: Same objection, Your Honor.

3 THE COURT: Well, I haven't heard this question.

4 Go ahead and ask the question.

5 MR. McCOLL: Go ahead and sustain us, Judge.

6 THE COURT: Pardon?

7 BY MR. McCOLL:

8 Q. Within the scope of your expertise --

9 THE COURT: Is this the same question you just asked
10 rephrased?

11 MR. McCOLL: No, Your Honor.

12 THE COURT: Doesn't have anything to do with social
13 security?

14 MR. McCOLL: Different question.

15 THE COURT: Okay. Go ahead.

16 BY MR. McCOLL:

17 Q. Within the scope of your expertise as an employment
18 specialist, do you deal with Medicare and social security
19 issues?

20 A. Yes, sir.

21 Q. And in that process, have you come to find out whether
22 social security is mandatory for an employer to participate in?

23 MR. KEMINS: Your Honor, objection. This is beyond
24 the scope of anything we asked him.

25 THE COURT: It's beyond the scope of the direct. I

1 sustain the objection.

2 BY MR. McCOLL:

3 Q. From the employee's perspective, do you know of your own
4 personal knowledge and your expertise, whether an employee can
5 go to an employer and say, "I don't wish to participate in the
6 social security program and please do not deduct for me for
7 that purpose"?

8 MR. KEMINS: Objection again, Your Honor. It's
9 beyond the scope.

10 THE COURT: That's beyond the scope of the direct. I
11 sustain the objection.

12 Please, Mr. McColl, try to keep your questioning within
13 the scope of the direct. Do you have any other questions?

14 MR. McCOLL: I'm just having difficulty
15 understanding --

16 THE COURT: Do you have any other questions,
17 Mr. McColl?

18 MR. McCOLL: Yes, Your Honor, I do.

19 BY MR. McCOLL:

20 Q. In August of 2000 you started this review; is that
21 correct?

22 A. Yes, sir.

23 Q. And when did you conclude it?

24 A. Late August 2000.

25 Q. So it took about a month?

1 A. Yes, sir.

2 Q. Okay. And did you say that you researched some law?

3 A. Yes, sir.

4 Q. And what law did you research?

5 A. I don't recall the specific cases.

6 Q. Did you send him an opinion letter?

7 A. No, sir.

8 Q. And I think you told us you didn't give him a court case?

9 THE COURT: If he's already said that, we don't need
10 to go over it again.

11 BY MR. McCOLL:

12 Q. Did you say that?

13 THE COURT: Mr. McColl --

14 MR. McCOLL: I don't remember.

15 THE COURT: -- let's move forward. He's already
16 answered that question once. Let's move forward.

17 BY MR. McCOLL:

18 Q. Did you look at any regulations?

19 A. Yes, sir.

20 Q. Which ones?

21 MR. KEMINS: Asked and answered and beyond the scope,
22 Your Honor. We'd object.

23 THE COURT: Oh, go ahead and answer. Do you remember
24 which regulations you looked at?

25 THE WITNESS: I don't recall the specifics, but it

1 would have covered the regulations for 3401.

2 BY MR. McCOLL:

3 Q. And did you discuss those with Mr. Simkanin?

4 A. No, sir.

5 Q. Why?

6 A. He didn't have any questions after I told him I was
7 denying his claim.

8 Q. But you didn't feel compelled to offer any explanations?

9 THE COURT: Let's don't argue with him about it.
10 He's already answered the question.

11 BY MR. McCOLL:

12 Q. Is it the policy of the IRS to offer an explanation?

13 MR. KEMINS: Objection, Your Honor.

14 THE COURT: I'm going to sustain the objection.
15 Let's stay within the scope of the direct examination.

16 BY MR. McCOLL:

17 Q. When you deny a claim from a citizen who gives you a --

18 THE COURT: Pardon me, Mr. McColl, that's a different
19 way of asking the same question. I've already sustained the
20 objection to the question. Go on to another question.

21 BY MR. McCOLL:

22 Q. Well, are there guidelines that you act under when you're
23 involved with this process?

24 MR. KEMINS: We're going to object, Your Honor.

25 Again, that's beyond the scope.

1 THE COURT: Are there guidelines you act under. No,
2 go ahead and answer the question. Are there guidelines you act
3 under?

4 THE WITNESS: Yes, sir.

5 THE COURT: Okay.

6 BY MR. McCOLL:

7 Q. Do the guidelines call for you to provide anything in
8 writing to the citizen?

9 A. Yes, sir.

10 Q. And did there come a point when you did that?

11 A. No, sir, but --

12 Q. Excuse me. Does the guideline require that you have to be
13 requested?

14 A. No, sir.

15 Q. Now, part of Mr. Simkanin's understanding of this depends
16 a great deal on whether the tax is on people or property or
17 activity; is that correct?

18 MR. KEMINS: Objection, Your Honor.

19 THE COURT: That's beyond the scope of the direct.

20 MR. McCOLL: Your Honor, this is in evidence.

21 THE COURT: Pardon me, Mr. McColl. Don't you respond
22 in that manner. You go on to another question.

23 BY MR. McCOLL:

24 Q. What class of tax was applied, direct or indirect?

25 MR. KEMINS: Objection, Your Honor, beyond the scope.

1 THE COURT: Mr. McColl, if you are unable to ask a
2 question within the scope of the direct, I'm going to have to
3 conclude that your questioning of this witness is concluded,
4 that you've exhausted the questions that are appropriate to ask
5 of this witness. So I'm going to give you another chance to
6 ask questions, if you have any to ask, within the scope of the
7 direct. And when you ask them beyond the scope, I'll conclude
8 that you've run out.

9 BY MR. McCOLL:

10 Q. Did you think this was a thoughtful, five-page letter that
11 he sent you?

12 MR. KEMINS: Objection, Your Honor.

13 THE COURT: I'll let him answer that.

14 A. I'm not sure I understand your question.

15 BY MR. McCOLL:

16 Q. Well, do you know what "thoughtful" means?

17 A. Yes, sir.

18 Q. Okay. Did you think some thought had gone into the
19 letter?

20 A. I thought some thought had went into it, yes.

21 Q. It cites probably 20 regulations and numerous court cases,
22 correct?

23 A. Yes, sir.

24 Q. Can you see how a person might have this view by
25 reading --

1 THE COURT: Pardon me. That's an argumentative
2 question. I'm going to give you one more chance, Mr. McColl,
3 to ask an appropriate question.

4 BY MR. McCOLL:

5 Q. Did you tell him he could appeal when you denied his
6 claim?

7 A. Yes, sir.

8 Q. Do you know whether he did or not?

9 A. We didn't get to the point of issuing a formal claim
10 disallowance letter because criminal investigation had already
11 intervened and had a freeze code on it.

12 Q. And what is the normal process had he wanted to appeal the
13 decision?

14 THE COURT: I think that's beyond the scope of the
15 direct. Mr. McColl, unless you have another question within
16 the scope, I'm going to ask that you be seated.

17 MR. McCOLL: Thank you, Your Honor.

18 THE COURT: Okay. Do you have any other questions?

19 MR. KEMINS: Nothing.

20 THE COURT: May this witness be excused?

21 MR. KEMINS: Subject to recall, Your Honor.

22 THE COURT: Okay. You can step down. You're subject
23 to being recalled as a witness by the government, but you can
24 leave the courtroom at this time.

25 Call your next witness.

1 MR. JARVIS: Your Honor, the government calls Randy
2 Perdue.

3 THE COURT: Okay. You may proceed.

4 MR. JARVIS: Thank you, Your Honor.

5 RANDY PERDUE,

6 having been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. JARVIS:

9 Q. Mr. Perdue, would you state your name and spell it for the
10 record, please.

11 A. Yes, my name is Randy Perdue. R-A-N-D-Y P-E-R-D-U-E.

12 Q. And how are you employed, sir?

13 A. I work at First National Bank Mid Cities.

14 Q. How long have you been employed in the field of banking?

15 A. I've been in the banking industry for 24 years.

16 Q. And did you at one time work for a bank by the name of
17 Western American National Bank?

18 A. Yes, I did.

19 Q. What period of time did you work there, sir?

20 A. I started in 1987 and I'm still employed.

21 Q. Do they have a different name now, though?

22 A. That's correct. We changed names.

23 THE COURT: Let me have you come up here -- The
24 attorneys come up here a minute, Mr. McColl and Mr. Jarvis.

25 (Bench conference with lead attorneys:)

1 THE COURT: What is going to be the subject of this
2 testimony?

3 MR. JARVIS: Only three exhibits, Your Honor. The
4 signature cards, that's it. We're not going into any of the
5 CTRs, of course.

6 THE COURT: Okay.

7 (End of bench conference.)

8 BY MR. JARVIS:

9 Q. I'm sorry. What period of time were you working with
10 Western American National Bank?

11 A. I started in 1987.

12 Q. Is that located in Bedford, Texas?

13 A. That is correct.

14 Q. I direct your attention, Mr. Perdue, to Government's
15 Exhibit 115, 116, and 117. Could you identify those three
16 documents, sir?

17 A. Yes. Those are signature cards for Arrow Custom Plastics.

18 MR. JARVIS: Your Honor, we would move those into
19 evidence at this time.

20 THE COURT: They're received.

21 BY MR. JARVIS:

22 Q. 115, the only person on the signature card would be Dianne
23 Clemonds.

24 A. Yes, sir.

25 Q. And 116, what happened there? Could you describe that as

1 far as change to the signature card?

2 A. Yes. On --

3 Q. Well, first of all, back up and give us a date, if you
4 would, on 115. The account name and --

5 THE COURT: You have that information. Just read it
6 into the record, Mr. Jarvis, if you want it in the record.

7 MR. JARVIS: Exhibit 115 would be in the name of
8 Simkanin, Inc., d/b/a Arrow Custom Plastics, and it's listed as
9 a corporation for profit. Dianne Clemonds on the signature
10 card.

11 BY MR. JARVIS:

12 Q. Directing your attention to the next exhibit, 116, that
13 was revised on 1-3 of 2000. What is happening there on January
14 the 3rd of 2000, sir?

15 A. They did a revised signature card. They took Dianne
16 Clemonds off and added Richard Simkanin.

17 Q. Backing up to 115, in your experience in banking, is it
18 unusual for the president and owner of a corporation to not
19 even be on the bank signature card?

20 A. Yes, sir.

21 Q. To your knowledge, when Government's Exhibit 115 was in
22 effect, was Mr. Simkanin the owner of Arrow Custom Plastics?

23 A. Yes, sir.

24 Q. Did he ever explain to you why he didn't want to be on the
25 bank signature card?

1 A. No, sir.

2 Q. Did Mr. Simkanin explain to you why there was a change
3 needed in Government's Exhibit 116, pulling Dianne Clemonds off
4 and putting his name on?

5 A. No, sir.

6 Q. Moving along to Exhibit 117, we're moving from a
7 corporation to a sole proprietorship; is that correct, sir?

8 A. Yes, sir.

9 Q. And the date of this would be July 13 of 2001.

10 A. That is correct.

11 Q. And is there anyone other than Mr. Simkanin on the
12 signature card at this time?

13 A. No, sir.

14 MR. JARVIS: Pass the witness.

15 THE COURT: Did you offer 117? All I show you
16 offered was 114 through --

17 MR. JARVIS: Yes, Your Honor, I offered 115, 116, and
18 117.

19 THE COURT: Okay. They're admitted.

20 MR. JARVIS: Pass the witness.

21 CROSS-EXAMINATION

22 BY MR. McCOLL:

23 Q. Good afternoon.

24 A. Good afternoon.

25 Q. If you are the owner of a corporation or the CEO, it's

1 certainly no crime not to be on the signature card, is it?

2 A. Not that I'm aware of any.

3 MR. McCOLL: Thank you.

4 THE COURT: Can this witness be excused?

5 MR. JARVIS: Yes, Your Honor.

6 MR. McCOLL: Yes, sir.

7 THE COURT: You're excused as a witness. You can
8 step down. You can go about your business.

9 Call your next witness.

10 MR. JARVIS: Your Honor, we would call Mr. Louis
11 Morris.

12 THE COURT: Come up and be seated here.

13 You may proceed.

14 MR. JARVIS: Thank you, Your Honor.

15 LOUIS MORRIS,

16 having been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. JARVIS:

19 Q. For the record, sir, would you state your full name and
20 spell it.

21 A. Louis Morris, L-O-U-I-S M-O-R-R-I-S.

22 Q. And how are you employed, sir?

23 A. How am I employed? I'm employed for Dick Simkanin at
24 Arrow Custom Plastics.

25 Q. And how long have you worked for Dick Simkanin at Arrow

- 1 Custom Plastics?
- 2 A. Over ten years.
- 3 Q. What is your current position, sir?
- 4 A. Tool room manager.
- 5 Q. And how long have you known Mr. Simkanin?
- 6 A. Since '83.
- 7 Q. Do you see him in the courtroom, sir?
- 8 A. Yes, I do.
- 9 Q. The second man to my left?
- 10 A. Yes, it is.
- 11 Q. Let me direct your attention to a period effective January
12 2000. Were you working at Arrow Custom Plastics at that time?
- 13 A. Yes.
- 14 Q. And did it come to your attention that Mr. Simkanin had
15 decided to no longer withhold taxes from the wages of the
16 employees?
- 17 A. Yes.
- 18 Q. And directing your attention to early 2001, about a year
19 after this had happened, did you contact an individual by the
20 name of Richard Warren?
- 21 A. Yes, I did.
- 22 Q. Who is Richard Warren, sir?
- 23 A. He's a guy that I ride motorcycles with that happens to be
24 an IRS agent.
- 25 Q. Did Mr. Simkanin send out some information to various

1 employees explaining basically his position and why he decided
2 to stop withholding?

3 A. Yes, he did.

4 Q. Let me turn your attention, sir, to Exhibit 148. I
5 believe it's open in front of you.

6 A. (Nods head.)

7 Q. Do you see that, sir?

8 A. Yes, I do.

9 Q. Did you send this e-mail attachment to Mr. Warren? The
10 e-mail attachment that Mr. Simkanin sent out, did you forward
11 it to Mr. Warren?

12 A. Yes, I did.

13 Q. For what purpose, sir?

14 A. To see what his response was to the e-mail I had gotten
15 from Dick.

16 MR. McCOLL: Can we get an exhibit number, Your
17 Honor?

18 MR. JARVIS: 148.

19 BY MR. JARVIS:

20 Q. And did Mr. Warren respond -- review the information from
21 Mr. Simkanin and respond?

22 A. Yes, he did.

23 Q. And did you forward Mr. Warren's comments to Mr. Simkanin
24 on February 21st, 2001?

25 A. Yes, I did.

1 Q. I direct your attention to Government's Exhibit 148. Is
2 that a copy of the e-mail you forwarded from yourself to Dick
3 Simkanin and Jerry Williams?

4 A. Yes, it is.

5 Q. And the --

6 MR. JARVIS: Your Honor, we would move Government's
7 Exhibit 148 into evidence.

8 THE COURT: It's received.

9 BY MR. JARVIS:

10 Q. Mr. Morris, the two or three lines at the bottom where it
11 says, "Subject: Taxable income," what is that? What part of
12 the message is that?

13 A. That's the question that was sent along with the e-mail to
14 Richard Warren.

15 Q. So it says, "Could you take a minute or two and look this
16 attachment over and tell me if it is true or not? If not could
17 you give me some ammunition to dispute it with?" Those are
18 your words, from Louis Morris to Richard Warren; is that right?

19 A. Yes.

20 Q. Along with the attachment.

21 A. Yeah.

22 Q. And Warren looks it over and sends back Government's
23 Exhibit 148. How did you -- After you sent this to
24 Mr. Simkanin on Wednesday, February 21, 2001, at 6:40 in the
25 morning, did you have a conversation with Mr. Simkanin

1 indicating whether or not he received it, read it, had any
2 reaction to it?

3 A. Yes, I did.

4 Q. Tell us about that.

5 A. Well, I don't remember a lot of the details about it, but
6 I just asked him if he got it and what he thought of it.

7 Q. And was that later that same day on February 21st, 2001?

8 A. Yes.

9 Q. Any other discussion about the contents of this e-mail
10 other than what you've already told us?

11 A. Not that I remember.

12 MR. JARVIS: One moment, please, Your Honor.

13 (Government counsel confer.)

14 MR. JARVIS: We pass the witness at this time.

15 THE COURT: Do you have any questions of this
16 witness?

17 CROSS-EXAMINATION

18 BY MR. McCOLL:

19 Q. Isn't it true, sir, that Mr. Simkanin, when you showed him
20 this or sent this to him, told you that if you would come back
21 with some actual law that he could respond to it?

22 A. I do remember something about that, yes, sir.

23 Q. You were asked about -- by the prosecutor about if he put
24 out an explanation to the people in the job at Arrow Custom
25 Plastics, why he stopped withholding. Did he explain that to

1 you in personal conversations?

2 A. Yes.

3 Q. Few or many times?

4 A. Several times.

5 Q. And where would these discussions take place?

6 A. There at work.

7 Q. Did he have a library of material regarding this stuff?

8 A. Yes, he did.

9 Q. Did some of these things make sense to you?

10 A. Yes.

11 Q. Did he seem like he was just trying to get out of paying
12 taxes?

13 MR. JARVIS: Your Honor, we object to the form of the
14 question. It calls for speculation.

15 MR. McCOLL: I think he can talk about the demeanor.

16 THE COURT: If I need a response, I'll invite one.

17 MR. McCOLL: Yes, sir.

18 MR. JARVIS: We'd object, Your Honor.

19 THE COURT: You can go ahead and answer that
20 question.

21 A. Okay. State the question again, please.

22 BY MR. McCOLL:

23 Q. When he presented this information to you, did he seem
24 like he was just trying to get out of paying taxes?

25 A. No.

1 Q. Seemed sincere about it?

2 A. Yes.

3 Q. And believed that this was the law.

4 A. Yes.

5 MR. JARVIS: Your Honor, again, we'd object to him
6 speculating about the state of mind of the defendant. We
7 object.

8 THE COURT: Are you telling me what you thought from
9 talking to him?

10 THE WITNESS: Yes. From what he said, yes.

11 THE COURT: Okay. I'll overrule the objection. But
12 you've gone as far as you need to go on that.

13 MR. McCOLL: Yes, sir.

14 BY MR. McCOLL:

15 Q. When it came to -- You said you worked there ten years.
16 When it came to engineering, did he follow the engineering --

17 MR. JARVIS: Your Honor, we'd object. Beyond the
18 scope.

19 THE COURT: I can tell it is beyond the scope, so I
20 sustain the objection.

21 BY MR. McCOLL:

22 Q. Was he a good engineer?

23 MR. JARVIS: Your Honor, again, we object to
24 relevance and beyond the scope.

25 THE COURT: Do you have anything else you want to ask

1 within the scope of the direct, Mr. McColl? If so, ask it now
2 and then we'll move on.

3 BY MR. McCOLL:

4 Q. Why did you stay there ten years?

5 MR. JARVIS: Your Honor, again, relevance.

6 THE COURT: I'm going to sustain the objection.

7 BY MR. McCOLL:

8 Q. When you were there -- the beginning of your tenure of ten
9 years and from the time that -- throughout the ten-year period,
10 did the company grow?

11 MR. JARVIS: Your Honor, we'd object to relevance.

12 THE COURT: Okay. I sustain that objection.

13 Mr. McColl, I'm going to again ask you to stick within the
14 scope of the direct. If you have another question within the
15 scope, ask it; otherwise, be seated.

16 BY MR. McCOLL:

17 Q. Do you know Mr. Simkanin's reputation in the community for
18 truth and honesty?

19 MR. JARVIS: Your Honor --

20 THE COURT: I sustain the objection.

21 You can be seated, Mr. McColl.

22 Do you have any further questions of this witness,
23 Mr. Jarvis?

24 MR. JARVIS: No, Your Honor.

25 THE COURT: Can he be excused as a witness?

1 MR. JARVIS: Subject to recall, Your Honor.

2 THE COURT: You can step down now, but you might be
3 recalled as a witness.

4 Call your next witness.

5 MR. KEMINS: We call Phillip Eastman, Your Honor.

6 THE COURT: You may proceed.

7 MR. KEMINS: Thank you, sir.

8 CHARLES PHILLIP EASTMAN,
9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. KEMINS:

12 Q. Could you give us your full name, spelling your last name,
13 please.

14 A. Charles Phillip Eastman, last name is spelled
15 E-A-S-T-M-A-N.

16 Q. And, Mr. Eastman, by whom are you employed?

17 A. The Internal Revenue Service.

18 Q. And how long have you been employed by them?

19 A. Twenty-seven years.

20 Q. And what's your current position within the Internal
21 Revenue Service?

22 A. I'm a taxpayer compliance officer.

23 Q. And what, briefly, are your duties as a taxpayer
24 compliance officer?

25 A. Currently I'm a coordinator of five different programs. I

1 coordinate things such as the statutes controls, the
2 bankruptcy, inventory, the prompt assessment requests, alimony
3 project, and the preparer projects.

4 Q. As part of your duties with the IRS, did you have any role
5 whatsoever in the criminal investigation of the defendant,
6 Mr. Simkanin?

7 A. Other than the responses to the SS-8 letters we sent in.

8 Q. You did not yourself do any investigation.

9 A. No, sir.

10 Q. Now, I've met with you previously and asked you to look at
11 what's marked as Government's Exhibits 136 through 147; is that
12 correct?

13 A. Yes, sir.

14 Q. And have you reviewed those?

15 A. Yes, sir.

16 Q. Are those a series of correspondence from the IRS to
17 Mr. Simkanin and letters back from Mr. Simkanin?

18 A. Yes, sir.

19 Q. And are they official IRS records?

20 A. Yes, sir.

21 MR. KEMINS: Your Honor, at this time I'd move
22 Government's Exhibits 136 through 147 into evidence.

23 THE COURT: They're received.

24 MR. KEMINS: Thank you.

25 BY MR. KEMINS:

1 Q. Now, Government Exhibit 136, that's a letter from the
2 Department of Treasury, Internal Revenue Service, dated June
3 30th, 2000, to Simkanin, Incorporated. It has some phone
4 numbers and things on there, and it says "Worker, Susan
5 McIntyre." And it says, "Dear Taxpayer: We have under
6 consideration, for Federal employment tax purposes, the status
7 of the above-named worker in the performance of service to you.
8 The worker states services were rendered for the years 2000."

9 And I would point out that Government's Exhibit 136, 142,
10 and 147 are similar letters from the IRS to Arrow Custom
11 Plastics -- 136, 142, and 144 are similar letters from the IRS
12 to Arrow Plastics; is that correct?

13 A. Yes, sir.

14 Q. And what triggers the sending of this type of letter to an
15 employer?

16 A. Well, the first letter was triggered by Ms. McIntyre when
17 she sent us an SS-8 form requesting a determination as to
18 whether or not she would be considered an employee of the
19 company.

20 Q. What is an SS-8 form?

21 A. It's a formal questionnaire. It's about four pages long,
22 legal -- I'm sorry. Letter size, and it's front and back.
23 It's filled with questions -- well, basically an outline of
24 what the behavior and financial controls and the relationship
25 to the firm is with this individual.

1 Q. Now, looking at the other letters we spoke about, Exhibit
2 142, that involves an employee named Kyle Lampkin, or worker to
3 be exact. And 144 involves a worker named Katherine Daum.

4 A. Yes, sir.

5 Q. Now, all of these people would have sent in this SS-8 to
6 the IRS.

7 A. Yes, sir.

8 Q. And why is it important to make a determination for a
9 worker what their status is with a company?

10 A. Well, primarily the worker is trying to avoid paying
11 self-employment tax, which is roughly 15.3 percent of the total
12 income earned at that source. The -- what we did --

13 THE COURT: Let me interrupt a minute. Why don't you
14 come up here.

15 (Bench conference with Mr. Kemins and Mr. McColl:)

16 THE COURT: I take it that the response was that they
17 were employees?

18 MR. KEMINS: Well, what's important here is the
19 response from Mr. Simkanin to these letters. The IRS
20 ultimately determined at least one of them was an employee.
21 But these letters triggered responses from Mr. Simkanin that we
22 think go to our burden of proof.

23 THE COURT: Let's get down to the important issue if
24 that's what you're leading to.

25 MR. KEMINS: Okay. Yes, sir.

1 THE COURT: Okay.

2 MR. McCOLL: Your Honor, just -- that he protected
3 the privacy rights, as he saw them, of these employees saying,
4 "I don't know under what authority are you asking me to give
5 you information about my employee."

6 THE COURT: You mean that's in the exhibit? I don't
7 understand what you're --

8 MR. McCOLL: Yes, sir. In his letter.

9 THE COURT: Well, I haven't seen the letters.

10 MR. McCOLL: Well, I just don't understand the
11 relevance of this.

12 THE COURT: Well, apparently the relevance is
13 something Mr. Simkanin responded.

14 MR. KEMINS: Yes, sir.

15 THE COURT: So let's get down to that.

16 MR. KEMINS: Yes, sir.

17 (End of bench conference.)

18 BY MR. KEMINS:

19 Q. Now, this letter regarding Ms. McIntyre went in on June
20 30th, 2000, and Government Exhibit 137 is a reply from
21 Mr. Simkanin dated 26 July 2000; is that correct?

22 A. Yes, sir.

23 Q. He asked some questions in that, and to move quickly along
24 here, Government Exhibit 138 is the IRS's response to
25 Mr. Simkanin's questions in his letter; is that correct?

1 A. Yes, sir.

2 Q. Now, Government Exhibit 139 is Mr. Simkanin again
3 responding to the IRS's response to his letter; is that
4 correct?

5 A. Yes, sir.

6 Q. And in that letter he says, "Although your letter contains
7 the heading 'Department of the Treasury,'" he puts that in
8 quotes, "it does not indicate the entity of which it is the
9 treasury of. For all I know, it could be the Department of the
10 Treasury of Puerto Rico or the Department of the Treasury of
11 IBM Corporation"; is that correct?

12 A. Yes, sir.

13 Q. Now, again, and this one -- This letter is dated 23 August
14 of 2000. Now, on September 11th, 2000, the IRS once again
15 responded to Mr. Simkanin trying to answer his questions; is
16 that correct?

17 A. Yes, sir.

18 Q. And did you author this letter?

19 A. Yes, sir, I did.

20 Q. And you provided all sorts of enclosures and tried to
21 answer his questions.

22 A. Yes, sir. Basically I tried to address every question he
23 had in his prior letter. Or actually prior two letters, the
24 letter dated July 26th and letter dated August 23rd, 2000.

25 Q. Now, Government's Exhibit 141 is his reply to your letter

1 where he, in effect, said that it looks like all -- whatever
2 duties you were writing about had been transferred from the IRS
3 to the Bureau of Alcohol, Tobacco, and Firearms; is that
4 correct?

5 A. Yes, sir.

6 Q. Now, Exhibit 142 is another one of those SS-8 letters for
7 another employee; is that correct?

8 A. Yes, sir.

9 Q. Which is dated October 4th, 2000. And on 13 October 2000
10 Mr. Simkanin again replied, and in that letter he said, in
11 part, "Please do not include authority under the Corporation
12 known as 'United States'." He put that in quotes, "'United
13 States of America', 'USA', or 'U.S.'"; is that correct?

14 A. Yes, sir.

15 Q. And then the IRS wrote him again on December 20th, 2000,
16 that another one of his workers had written in asking for their
17 status to be worked out; is that correct?

18 A. Yes, sir.

19 Q. And once again Mr. Simkanin replied and was not going to
20 answer any of the questions.

21 A. Yes, sir.

22 Q. And then again -- and I should say that reply, which is
23 Government Exhibit 145, is dated 3 January 2001. On January
24 19th, 2001, the IRS again responded to Mr. Simkanin; is that
25 correct?

1 A. Yes, sir.

2 Q. And on the 25th of January 2001, Mr. Simkanin replied and
3 again said, "Please do not include authority under the
4 Corporation known as the 'United States', 'United States of
5 America', 'USA', or 'U.S.'"; is that correct?

6 A. Yes, sir.

7 Q. Now, again, these letters that went out, these SS-8
8 letters, they were triggered by his employees writing into the
9 IRS; is that correct?

10 THE COURT: Let's don't summarize. I think we've
11 already developed all that.

12 A. They were triggered by his workers.

13 THE COURT: When I tell him not to proceed further,
14 you don't answer the question.

15 THE WITNESS: I'm sorry.

16 THE COURT: Let's get down to something that you
17 haven't gone over; otherwise, conclude your questioning.

18 MR. KEMINS: Yes, sir. Could I have one second, Your
19 Honor?

20 THE COURT: Okay.

21 (Government counsel confer.)

22 MR. KEMINS: I have no further questions, Your Honor.
23 Thank you. Pass the witness.

24 THE COURT: Okay. Do you have any questions of this
25 witness?

1 MR. McCOLL: Yes, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. McCOLL:

4 Q. I think you testified that these letters --

5 THE COURT: You don't need to go over what he's
6 already testified to. We've heard that. Go on with some
7 questions.

8 BY MR. McCOLL:

9 Q. Were you able to determine whether or not these workers
10 for Mr. Simkanin were employees?

11 A. Yes, sir. Our opinion was that they are employees.

12 Q. And there's more than one definition of employee in the
13 Internal Revenue Code?

14 MR. KEMINS: Objection, Your Honor, beyond the scope.

15 THE COURT: I sustain the objection.

16 BY MR. McCOLL:

17 Q. Which definition of employee did you --

18 THE COURT: I'm sustaining the objection as to the
19 definitions of employees in the Internal Revenue Code. There
20 will be no further questions about that from this witness.

21 MR. McCOLL: May I ask him which one he applied?

22 THE COURT: I'm telling you there will be no further
23 questions on that subject, Mr. McColl.

24 BY MR. McCOLL:

25 Q. Is there a difference of opinion, from time to time,

1 whether or not someone is an employee or not?

2 A. Yes, sir.

3 Q. Now, I know that these letters are somewhat sarcastic, but
4 does a worker have a right of privacy as to the information
5 about him when you contact a business person?

6 MR. KEMINS: Object, Your Honor, beyond the scope.

7 THE COURT: Yes. That's beyond the scope of the
8 direct and, plus, don't have a preamble into your question
9 that's a statement. Ask only questions. I sustain the
10 objection to that question.

11 BY MR. McCOLL:

12 Q. Are you hampered in your work at all in trying to get
13 information by the Privacy Act?

14 MR. KEMINS: Objection, Your Honor. That's --

15 THE COURT: I sustain the objection.

16 BY MR. McCOLL:

17 Q. To your knowledge, can an employer get in trouble or
18 violate any law with regard to the privacy of an employee by --

19 THE COURT: I sustain that objection as well, and I'm
20 going to ask that you be seated unless you have a question
21 that's within the scope of the direct that you would like to
22 ask.

23 MR. McCOLL: Thank you, Your Honor.

24 THE COURT: Okay. Can this witness be excused?

25 MR. KEMINS: Subject to recall, Your Honor.

1 THE COURT: Okay. You're excused. You can step
2 down, but you're not excused as a witness. You're excused from
3 the stand, but the government might recall you.

4 Call your next witness.

5 MR. JARVIS: Your Honor, we would call Ron Wright.

6 THE COURT: You may proceed.

7 MR. JARVIS: Thank you, Your Honor.

8 RON WRIGHT,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. JARVIS:

12 Q. For the record, sir, would you state your full name and
13 spell it for the record.

14 A. Ron Wright, R-O-N W-R-I-G-H-T.

15 Q. And how are you employed, sir?

16 A. I'm the district director for Congressman Joe Barton.

17 Q. How long have you been with Congressman Barton?

18 A. About three years, nine months.

19 Q. What are your duties as a district director?

20 A. We have three congressional offices. I oversee those
21 three offices and fill in for the Congressman at meetings and
22 events when he's in D.C.

23 Q. As part of those duties, do you handle correspondence or
24 letters to the Congressman from constituents?

25 A. Yes.

1 Q. Let me direct your attention, Mr. Wright, to Government's
2 Exhibit 131. Let me know when you're there.

3 A. I'm here.

4 Q. And if you could keep your hand on 113. We'll be coming
5 back to that.

6 Could you identify Government's Exhibits 131, 132, and
7 134.

8 A. Yes. The first two are letters from Mr. Simkanin to the
9 Congressman regarding the IRS, and the third is a response from
10 Congressman Barton to Mr. Simkanin.

11 Q. 132 and 133 are from Mr. Simkanin and 134 is the final
12 response from the Congressman?

13 A. That is correct.

14 MR. JARVIS: Your Honor, we would move into evidence
15 Government's Exhibits 131, 132, and 134.

16 THE COURT: They're received.

17 BY MR. JARVIS:

18 Q. Now, 131, dated 11 January 1999, is that a correct date?

19 A. No. We believe that that is an incorrect date.

20 Q. What should it be, sir?

21 A. That should be 2001, I believe.

22 Q. And do you know that just by referring to the other
23 letters, the series of correspondence?

24 A. Yes.

25 Q. 2001 or 2000?

1 A. 2000, I beg your pardon.

2 Q. So he starts off on 11 January 2000, and is it your
3 responsibility to respond to that letter?

4 A. Yes. We routinely will respond to all such letters.

5 Q. What, if anything, did you do as far as contacting the
6 IRS, or whatever?

7 A. Typically, and as we did in this case, we forward the
8 constituent's concerns to the relative federal agency, in this
9 case the IRS, for their response, which we then forward back to
10 the constituent.

11 Q. Were there a series of letters in between January and
12 August of 2000 between you and Mr. Simkanin?

13 A. Yes, there were.

14 Q. Direct your attention to Government's Exhibit 132. Would
15 you tell us the purpose of this letter, sir?

16 A. This is --

17 Q. From Mr. Simkanin to the Congressman.

18 A. Congressman Barton. Yes, this is another letter from
19 Mr. Simkanin where he is not satisfied with the IRS, the
20 response he's getting from the IRS.

21 Q. On page 2 of the letter, sir, again on Exhibit 132, does
22 he make reference to new legislation being introduced by
23 Congressman Ron Paul?

24 A. Yes, he does.

25 Q. And directing your attention to Government's Exhibit 113,

1 is that a copy of a press release by Congressman Ron Paul
2 describing that new legislation, HR 4855?

3 A. Yes, it is.

4 MR. JARVIS: Your Honor, we would move in
5 Government's Exhibit 113.

6 THE COURT: It's received.

7 BY MR. JARVIS:

8 Q. And what is the purpose of the new legislation by
9 Congressman Paul?

10 A. The legislation would basically abolish the requirement
11 for withholding tax and require citizens to pay taxes on a
12 monthly basis.

13 Q. All right. Moving, sir, to Government's Exhibit 134,
14 could you tell us what that is? A letter dated March 15 of
15 2001.

16 A. This is a letter from Congressman Barton to Mr. Simkanin
17 explaining the response that we had received from the IRS.

18 Q. In the prior correspondence, had Mr. Simkanin basically
19 taken the position that wages are not subject to tax?

20 A. Yes.

21 Q. Paragraph three of Congressman Barton's letter states, "In
22 answer to your letter, the Taxpayer Advocate has responded;
23 yes, the income of Americans who live and work exclusively
24 within the United States is subject to the income tax imposed
25 by Title 26, United States Code, Section 1. I've also enclosed

1 material to inform you of the position taken by the IRS and the
2 Taxpayer Advocate Service regarding current statutory arguments
3 disputing the legality of the individual income tax. I trust
4 that this information will be of assistance to you."

5 Walk us through the attachments and what they are and why
6 did you give these attachments to Mr. Simkanin?

7 A. These are bulletins from the IRS that we routinely will
8 send to constituents in matters like this that explains why
9 withholding tax is necessary. There's also a bulletin to
10 employees warning them about employers that may fail to
11 withhold their taxes.

12 Q. These are called consumer alerts, the first attachment
13 dated February 14 of 2001, Consumer Alert to Watch For
14 Employers Failing To Withhold Taxes. Did you include that?

15 A. Yes, we did.

16 Q. Paragraph two, "These schemes are based on an incorrect
17 interpretation of the Internal Revenue Code that wages are not
18 a source of income and that the definition of sources of income
19 does not apply to U.S. individuals. This incorrect
20 interpretation is contrary to the express language of the
21 Internal Revenue Code and its regulations, and the
22 interpretation has been refuted in court."

23 In any of your contact with Mr. Simkanin, Mr. Wright, did
24 he ever ask you to provide him with the court decisions that
25 had refuted his position?

1 A. I don't recall him requesting any kind of case law, if
2 that's what you're asking.

3 Q. And the second attachment, also dated February 14 of '01,
4 the first paragraph of that one says, "No tax is being withheld
5 from your wages. Illegal schemes are being promoted that
6 instruct employers not to withhold federal income tax or
7 employment taxes from wages paid to their employees. These
8 schemes are based on an incorrect interpretation of tax law and
9 have been refuted in court. If you have concerns, you can get
10 help," and then it lists the numbers; is that right, sir?

11 A. That's correct.

12 THE COURT: Isn't that basically the same thing you
13 read a minute ago, Mr. Jarvis?

14 MR. JARVIS: It's similar, Your Honor.

15 THE COURT: Let's don't go over the same thing
16 different ways. That's in evidence already. There's no need
17 to spend a lot of time talking about it.

18 BY MR. JARVIS:

19 Q. Mr. Wright, after you sent -- or after Congressman Barton
20 sent the letter, Government's Exhibit 134, on March 15, 2001,
21 did the defendant ever provide to you any court cases to
22 support his position?

23 A. No.

24 MR. JARVIS: Pass the witness.

25 THE COURT: Okay. Do you have any questions of this

1 witness?

2 MR. McCOLL: Yes, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. McCOLL:

5 Q. Good afternoon, sir.

6 A. Good afternoon.

7 Q. In the letter you were asked about, March 15th, Joe Barton
8 writes, "I completely share your frustration and have worked in
9 the past to drastically reform the tax code to make it easier
10 for people to understand." Was that your understanding of
11 Mr. Barton's objective in sponsoring some legislation?

12 MR. JARVIS: Excuse me, Your Honor. Which exhibit
13 are we on?

14 MR. McCOLL: Government's 134.

15 BY MR. McCOLL:

16 Q. Because he felt --

17 MR. JARVIS: Excuse me.

18 THE COURT: Was that his objective in sponsoring the
19 legislation? That was his question.

20 A. To simplify the tax code.

21 BY MR. McCOLL:

22 Q. Yes, sir.

23 A. Yes.

24 Q. To make it easier for people to understand.

25 A. Yes.

1 Q. And in the attachments that you sent with your letter,
2 they were IRS generated, correct?

3 A. That's correct.

4 Q. There was not one case law or one case cited in any of
5 those; is that correct?

6 A. I believe that's correct.

7 Q. And in the correspondence and all of the attachments,
8 et cetera, that Mr. Simkanin sent to you -- or to Joe Barton's
9 office, you understood in all those filings and in the
10 attachments that Mr. Simkanin attached to the many things that
11 he sent you, that he always agreed that we are all subject to
12 the tax code but not necessarily liable for the particular
13 taxes; is that correct?

14 A. That was my understanding.

15 MR. McCOLL: Thank you.

16 THE COURT: Okay. Can this witness be excused?

17 MR. McCOLL: Yes, Your Honor.

18 MR. JARVIS: Subject to recall, Your Honor.

19 THE COURT: Okay. You can step down. They're
20 through with you now, but they may want you again.

21 How many more witnesses does the government now have?

22 I've forgotten. I've lost track.

23 MR. JARVIS: We have one left, Your Honor.

24 THE COURT: And who is that?

25 MR. JARVIS: That would be our case agent, Special

1 Agent Allan McGowan.

2 THE COURT: And how long do you anticipate his
3 testimony will take?

4 MR. JARVIS: Maybe 10 or 15 minutes on direct, Your
5 Honor.

6 THE COURT: Okay. That's going to run us well after
7 6:00 o'clock by cross-examination.

8 MR. McCOLL: Your Honor, I probably won't have too
9 much, but in light of --

10 THE COURT: If we get through -- I've decided we're
11 going to quit around 6:00 o'clock if we can, but if it won't
12 take any longer and if Mr. McColl doesn't have much, we'll go
13 ahead.

14 Call him on in. You may proceed, Mr. Jarvis.

15 ALLAN McGOWAN,

16 having been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. JARVIS:

19 Q. Would you state your name and spell it for the record.

20 A. My name is Allan McGowan, A-L-L-A-N M-C-G-O-W-A-N.

21 Q. And how are you employed, sir?

22 A. I'm a special agent with Internal Revenue Service.

23 Q. How long have you been with the IRS?

24 A. Since 1982.

25 Q. Are you the case agent assigned to this case?

1 A. Yes.

2 Q. I would like to direct your attention to Exhibit 107.

3 Would you identify that, sir?

4 A. That is the target letter that I hand-delivered to

5 Mr. Simkanin.

6 MR. JARVIS: Your Honor, we would offer that into

7 evidence at this time.

8 THE COURT: It's received. What was the number of

9 that?

10 MR. JARVIS: 107, Your Honor.

11 THE COURT: Okay. Go ahead.

12 BY MR. JARVIS:

13 Q. You didn't have any conversation. You just delivered the

14 letter; is that right, sir?

15 A. That's correct.

16 Q. And did you have occasion, following the date of that

17 letter, to actually deliver some various subpoenas to

18 Mr. Simkanin in May, June, and August of 2001?

19 A. That's correct.

20 Q. Again, just serve the subpoena and no conversation; is

21 that right?

22 A. That's right.

23 Q. I direct your attention to Exhibits 1 and 2. Are you

24 there?

25 A. Yes.

1 Q. All right. Are those the certified records indicating the
2 official incorporation of records of Arrow Custom
3 Plastics/Simkanin, Inc.?

4 A. That's correct.

5 MR. JARVIS: We would move Exhibits 1 and 2 into
6 evidence, Your Honor.

7 THE COURT: They're received.

8 BY MR. JARVIS:

9 Q. Direct your attention, Agent McGowan, to Exhibits 148
10 through 152.

11 A. You mean 149?

12 Q. Yes, I'm sorry.

13 THE COURT: To 152, is that what you said?

14 MR. JARVIS: Yes, Your Honor. That's correct.

15 THE COURT: Okay. Go ahead.

16 BY MR. JARVIS:

17 Q. And could you identify Exhibit 149, please.

18 A. Exhibit 149 is an IRS news release. It was released on
19 January 31, 2002. It's entitled the --

20 MR. McCOLL: Objection, Your Honor. May we approach?

21 THE COURT: Yes, you can approach.

22 (Bench conference with lead attorneys:)

23 MR. McCOLL: This is the exhibit, Your Honor, and
24 it's hearsay. I can't cross-examine.

25 THE COURT: How is that relevant to this case?

1 MR. JARVIS: It goes to willfulness, Your Honor. It
2 shows that this information was available to all citizens,
3 including the defendant.

4 MR. McCOLL: But it wasn't given to him.

5 MR. JARVIS: Well, we can recall him in rebuttal. He
6 talked about he did extensive research, but his research,
7 apparently --

8 THE COURT: Well, for the time being I'm going to
9 sustain the objection as to that exhibit. That's 149.

10 MR. JARVIS: All right.

11 (End of bench conference.)

12 MR. JARVIS: Could I have just a moment in light of
13 the Court's ruling?

14 THE COURT: Yes.

15 (Government counsel confer.)

16 MR. JARVIS: Pass the witness.

17 THE COURT: Let's see, did you offer any of the
18 exhibits you asked him about other than 149, which I excluded?

19 MR. JARVIS: No, Your Honor.

20 MR. KEMINS: One and 2, we offered 1 and 2.

21 THE COURT: I'm talking about 148 through 151.

22 MR. JARVIS: Actually, it was 149, Your Honor, but --

23 THE COURT: You didn't offer --

24 MR. JARVIS: I didn't offer any of those, and I will
25 not at this time.

1 THE COURT: Well, I thought you offered Exhibit 149,
2 but you're saying you didn't offer any of them?

3 MR. JARVIS: No, we had a bench conference before I
4 offered it, Your Honor.

5 THE COURT: Okay.

6 MR. JARVIS: Pass the witness.

7 THE COURT: Do you have any questions, Mr. McColl?

8 MR. McCOLL: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. McCOLL:

11 Q. Agent McGowan, is that your real name, Allan McGowan?

12 A. Yes.

13 Q. Do you recall Mr. Simkanin testifying in the grand jury
14 over a year ago that --

15 THE COURT: That's beyond the scope of the direct and
16 is something I've already instructed that you not go into. Do
17 you have anything within the scope of the direct that is an
18 appropriate question to ask? Otherwise, be seated.

19 MR. McCOLL: No, sir. Thank you.

20 THE COURT: Okay. We are going to recess now, and
21 we'll resume --

22 MR. JARVIS: Excuse me --

23 THE COURT: Well, first of all, does the government
24 rest?

25 MR. JARVIS: Forgive me, Your Honor, but we might

1 recall one witness very briefly. So we're not going to rest,
2 but we will rest first thing in the morning after we might call
3 one witness -- or recall one witness.

4 THE COURT: Okay. We're recessing overnight, and
5 I'll see you at 8:30 in the morning.

6 (Jury out, 5:56 p.m.)

7 THE COURT: Y'all be seated just a minute.

8 Mr. McColl, I would like to go ahead and swear your
9 remaining witness, Mr. Paul. Would you call him forward so I
10 can administer the oath to him.

11 MR. McCOLL: I'll check and see if he's here.

12 THE COURT: Okay.

13 (Brief pause.)

14 MR. McCOLL: He's not here, Your Honor.

15 THE COURT: Is he out in the hall maybe?

16 MR. McCOLL: I don't know.

17 THE COURT: Do you know him when you see him?

18 MR. McCOLL: I do know him when I see him.

19 THE COURT: Why don't you see if maybe he's out in
20 the hall. Surely he's had time to get here from Houston.
21 Where was he coming from?

22 MR. McCOLL: I thought it was called Lake of the
23 Pines. I'm not exactly sure where that is.

24 THE COURT: I think that's down in the Houston area,
25 I believe.

1 MR. McCOLL: Well, he had some difficulty. It was
2 kind of a difficult and tortured situation, so we'll see
3 whether he came.

4 THE COURT: Is he here yet?

5 MR. BEALL: No, sir.

6 THE COURT: Do you know him when you see him?

7 MR. BEALL: Yes, sir.

8 THE COURT: Who are you?

9 MR. BEALL: I'm Charles Beall.

10 THE COURT: Okay. Well, are you going to have him as
11 a witness? I'm trying to find out where we are. I'm trying to
12 get some feel for how long we'll be tomorrow.

13 MR. McCOLL: I will call him and I will call a number
14 -- if you want me to provide it to your court deputy tonight --
15 to find out if he's coming or not. But, frankly, Your Honor, I
16 do not know at this point.

17 THE COURT: Okay. We'll leave it that if he is going
18 to be used as a witness, I'll swear him the first thing in the
19 morning before the jury is brought into the courtroom.

20 MR. McCOLL: Yes, sir. Is the Court through? I do
21 have one brief housekeeping.

22 THE COURT: Okay.

23 MR. McCOLL: It's regarding -- the prosecutor and I
24 have talked about his potential recall of Dianne Clemonds about
25 -- to show the amount of money that went to Mr. Simkanin. And

1 I didn't know exactly how to approach that and so we thought
2 we would discuss it with the Court, because it was my
3 understanding that we had already passed that point and
4 already --

5 THE COURT: Well, I thought we had, too.

6 MR. KEMINS: Your Honor, if I could address it,
7 please?

8 THE COURT: Yes.

9 MR. KEMINS: We were concerned about a mistaken
10 impression the defense's cross-examination of Mr. Kelly left
11 with the jury, that for the years he had asked him about, 1996
12 and 1997, that Mr. Simkanin, in fact, had no income. The
13 government's position is that is not true. That Ms. Clemonds
14 would testify that at the defendant's instruction she either
15 took checks made out to cash to the bank to cash and brought
16 that cash to Mr. Simkanin, or took checks made out in his name
17 to the bank in those years, cashed them, and brought him the
18 cash. So we just wanted to correct that. We believe the
19 mistaken impression brought out in the cross-examination of --

20 THE COURT: So you'll limit it to '96?

21 MR. KEMINS: 1996 and 1997.

22 THE COURT: Well, I think the door has been opened as
23 to those two years.

24 MR. McCOLL: But, Your Honor, he's not on trial for
25 that. I was just --

1 THE COURT: Well, why did you ask the witness about
2 it, then?

3 MR. McCOLL: Because the implication was that he had
4 done something wrong by not filing.

5 THE COURT: Well, you wanted to persuade the jury
6 that he didn't do anything wrong by filing, I take it, by your
7 asking the question and getting the answer?

8 MR. McCOLL: Well, right, but he was an expert there.

9 THE COURT: And since you left that implication with
10 the jury, the government is entitled to respond to it, so I
11 will let them make that proof as to those two years.

12 MR. KEMINS: Thank you, Your Honor.

13 THE COURT: Okay. I'll see y'all at 8:30 in the
14 morning.

15 (Proceedings concluded for the day, 6:00 p.m.)

16 -o0o-

17 CERTIFICATE

18 I certify that the foregoing is a correct transcript from
19 the record of proceedings in the above-entitled matter. I
20 further certify that the transcript fees format comply with the
21 those prescribed by the Court and the Judicial Conference of
22 the United States.

21

22 _____
23 Eileen M. Brewer
24 Official Court Reporter
25 Texas CSR No. 3016

Date