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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA * Criminal Action
No. 06-50164
VERSUS *
Shreveport, Louisiana
TOMMY K. CRYER * July 9, 2007
* * * * *

VOLUME I
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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MORNING SESSION

JULY 9, 2007

(Court called to order with defendant
present at 8:39 a.m.)

THE COURT: Good morning. Please be seated. When we left following Friday's hearing, there were some developments that the Court was made aware of on Friday afternoon. Mr. Campbell, where are we this morning?

MR. CAMPBELL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CAMPBELL: Just to kind of recap what's happened, basically, late Friday afternoon the Government reassessed the case and it was -- a decision was made at that time to proceed on the lesser included offenses. And so the issue became, since the Court had dismissed those pursuant to the defense's motion to dismiss for -- I think the way the motion was styled was for duplicity because we charged the lesser included offenses as separate offenses. The question is: Where does that stand as far as the indictment? And it is the Government's contention that the two counts of the superseding indictment that were left, the language does provide all of the essential elements to plead the lesser included offenses for, basically, 7203, a misdemeanor failure to file or pay taxes. And because since the language of the indictment plead that, certainly the defendants were on notice that the lesser

1 included offenses would be a part of this trial, because in
2 their motion they certainly plead it or certainly argue that
3 those counts were lesser included offenses, and the Court in
4 its order stated that it would present those offenses as lesser
5 included offenses. The defense certainly was on notice that
6 part of this trial would be those charges; and, therefore, it
7 is the Government's position that, at this point, to proceed
8 forward on the lesser included offenses of 7203, failure to
9 file and pay taxes. And in support of our posture at this
10 point, the Government will submit case law to the Court and
11 Defense Counsel.

12 (Counsel hands document to the Court.)

13 MR. CAMPBELL: And for the record, the cases that
14 I've just submitted, there's a Supreme Court case, United
15 States v. Hutcheson. The cite is 312 U.S. 219. And the other
16 case -- two Fifth Circuit cases: United States v. Quintero,
17 872 F.2d 107; and United States v. Mitchell, 484 F.3d 762. And
18 then a case from the Sixth Circuit which is probably about as
19 on point as it's going to get with this particular issue is
20 United States V. Perez, 457 F.2d 555.

21 And so for the Government, the issue is, first of
22 all, does the superseding indictment as it stand allege the
23 offense of willful failure to file and willful failure to pay
24 taxes. And when you look at the language of the superseding
25 indictment, for example, on Count 1, it alleges all of the

1 elements that would be required. You have the willfulness
2 alleged. You have the failure to file taxes. You have the
3 applicable deadline date. For example, on Count 1, the
4 deadline is April 17 because of the weekend where the 15th fell
5 on that particular year. You have the fact that taxes were
6 owing, even though that's not a requirement for willful failure
7 to file. And you also have the same allegations made on behalf
8 of the trust as well.

9 So when you look at it, you have the willfulness
10 pleading, you have the fact that they failed to file the return
11 as required by law, and you also have the applicable deadline
12 dates. Those are basically the elements of willful failure to
13 file or pay taxes under 7203. And so Count 1 alleges the
14 misdemeanor, a lesser included misdemeanor. It's a willful
15 failure to file and pay taxes. And the same is applicable to
16 Count 2. And so that certainly puts Defense on notice of those
17 lesser included offenses.

18 And even though those are two particular counts
19 reported to plead mis -- I mean, excuse me, felony offenses of
20 evasion, in *Hutcheson* the Court said -- and I'm looking at page
21 229 pinpoint cite: "In order to determine whether an
22 indictment charges an offense against the United States,
23 designation by the pleader of the statute under which he
24 purports -- purported to lay the charge is immaterial. He may
25 have conceived the charge under one statute which would not

1 sustain the indictment, but it may nevertheless come within the
2 terms of another statute." So that certainly is on point in
3 this particular case here where the indictment purported to
4 charge a felony, but it also charges misdemeanors.

5 Then you go to the case of United States v. Quintero,
6 which is a Fifth Circuit case, and here's just the general
7 proposition -- and I'm looking at page 111 for pinpoint
8 reference here. The test for determining whether an indictment
9 is sufficient, quote, is whether it contains the essential
10 elements of the offense so that it is fairly -- so that it
11 fairly informs the defendant of the charges against him and
12 adequately enables the defendant to be protected against
13 further prosecution for the same offense.

14 And certainly the indictment meets that threshold as
15 well as far as the lesser included offenses.

16 Now, in Mitchell, which is 484 F.3d 762, this is in a
17 different context because it's talking about a variance wherein
18 you have a situation where the evidence at trial was different
19 than what was alleged in the indictment. So it's kind of
20 different because at this point we haven't gotten into the
21 evidence at trial because we haven't taken any testimony yet,
22 but I think the principle applies here the same. In this case,
23 and just looking at basis pinpoint -- it's hard to find the
24 pinpoint on these. I believe around 772. Basically, it talks
25 about a situation where the government charged the defendant

1 with possession of a firearm during the commission of a drug
2 trafficking offense. And in this case, the drug trafficking
3 offense that the government alleged in the indictment was
4 possession of crack cocaine with intent to distribute. And the
5 facts of this particular situation is that in this particular
6 count the defendants broke into a home, they were armed, and at
7 the time the government alleged that they broke into the home
8 and stole crack cocaine out of the home. But at trial, the
9 evidence showed that they did break into the home, that they
10 did -- that they were armed, but there were no drugs in the
11 house. So the question is, you had a variance issue. And so
12 the court resolved this issue by saying even though the
13 government did not prove the crime alleged in the indictment,
14 that is, possession of crack cocaine with intent to distribute,
15 because there were no drugs in the home, the government did
16 prove the lesser included offense, that is, attempted
17 possession of crack cocaine with the intent to distribute.
18 Because when they went into the home, they had every intent to
19 possess crack cocaine. So the court resolved that by saying
20 the indictment did plead the lesser included, and that lesser
21 included offense is included in the greater offense of
22 possession with intent to distribute crack cocaine. And so the
23 court said the remedy at that point is basically to modify the
24 sentence to show that the person was convicted of the lesser
25 included offense as opposed of the greater offense, which is

1 possession of -- excuse me, possession of a firearm with
2 intent -- possession of a firearm in furtherance of a drug
3 trafficking crime, and the crime being possession of crack
4 cocaine with intent to distribute it. In this case, the
5 evidence at trial showed that there was no crack there, so the
6 lesser included offense of attempted possession was proven and
7 the court modified the sentence accordingly. And then,
8 finally -- and just with time reference, that's a 2007 case,
9 May 15 -- excuse me, April 12, 2007 case. That's a pretty
10 recent case.

11 And then, finally, the last case, it's probably about
12 as on point as you're going to get, is U.S. v. Paris out of the
13 Sixth Circuit. And here is an interesting case where the
14 defendants were charged in the indictment for escape from a
15 hospital where they were committed. Now, that was the charge
16 in the indictment. And they were charged under 42 USC 261,
17 which makes it a crime for anyone to escape from a mental
18 hospital under federal control where they've been committed.
19 Now, these particular defendants, they were sent to prison,
20 they were part of a drug program, and they completed a drug
21 program as part of their particular sentence. They were sent
22 to this particular hospital as workers or as volunteers. Okay.
23 But yet when they got there, they escaped. So the question is:
24 Did the indictment charge the correct offense? Because they
25 were never committed there. And so the court determined that

1 the indictment did not charge the correct offense because the
2 purpose of this statute was to deal with escape by persons who
3 are committed to the hospital, not people who happen to work
4 there or may be doing other services there. But the court said
5 that when looking at the indictment, the indictment charged
6 another offense, which is escape from a prison or -- escape
7 from the custody of the institution or officer. And in this
8 case, the indictment alleged all of the requisite facts as far
9 as the person escaped from an institution that was in the
10 control of the Attorney General of the United States. And so
11 the court looked at that and said: Well, it didn't charge "A"
12 because "A" was not intended to apply to these facts, but
13 instead they charged "B," and therefore we're going to let the
14 conviction stand and sentence them accordingly for "B."

15 And so there you have several examples of cases
16 that's kind of dealt with this issue. And I think the
17 overriding issue is: Does the indictment as stand plead the
18 essential elements of the offense? In this case, it does.

19 Then the next question that comes: What is the
20 prejudice? Certainly the defense is not prejudiced in the
21 sense that instead of now of the Government proceeding on a
22 felony, we're proceeding on a misdemeanor. So in one sense,
23 the Government's position inured to the defendant's benefit as
24 far as sentence exposure and so forth. No. 2, there's no
25 prejudice because it really doesn't change the trial, because

1 when you get to the bones of this trial, this trial is about
2 willfulness. It's not about challenging the government's case
3 in chief. It's not about whether there is insufficient
4 evidence to show that he filed a, failed to file a tax return
5 or whether there's insufficient evidence to show whether he was
6 required to file a tax return. The elements are pretty much
7 conceded. It's just a matter of whether or not there's an
8 affirmative defense applicable here because of the good faith.
9 And that analysis doesn't change. It doesn't change the
10 rulings that the Court has made as far as the exhibits that
11 were excluded by the Court. Even with you go forward with the
12 willful failure to file, those exhibits are not relevant that
13 the Court excluded. And so there's very little prejudice, if
14 not none at all, from going forward with the misdemeanors. It
15 certainly inures to the defendant's benefit, because there's a
16 felony exposure here. And the indictment properly put the
17 defense on notice of the charges that are being tried.

18 And so with the authority that the Government cited,
19 the Government contends that it is appropriate at this point to
20 proceed in this posture and to go forward with the misdemeanor
21 counts of 26:7203, failure to file and failure to pay taxes.

22 THE COURT: There would actually have to be a
23 redacted indictment prepared substituting the statutory
24 citation for 7203?

25 MR. CAMPBELL: That's correct. And there also would

1 have to be some redactions in accordance with the Court's
2 earlier ruling to dismiss Counts 3 and 4. So those would have
3 to be completely redacted from the indictment, and then the
4 appropriate citation changes would have to be made, as well.

5 THE COURT: Mr. Becraft?

6 MR. BECRAFT: May it please the Court. This is a
7 change in the trial posture for which we've had little notice,
8 and the Government has had the opportunity to dig in and pull
9 out some cases which we have not been, and I would like to also
10 ask during the course of my remarks, Your Honor, that we be
11 given some time to assess the situation.

12 But, you know, to address the point about what the
13 Government is doing in this case, you know, the indictment
14 charged four different counts. There was an attack made
15 pretrial by motion to dismiss on the willful failure to file
16 counts. The Court agreed and dismissed those counts. So
17 pretrial, this was a tax evasion case for two counts. When we
18 had the pretrial conference, the Court said: Defense, put in
19 some new requested jury instructions, which I did. And that
20 afternoon -- I think they were filed about 4:58 that afternoon,
21 Friday, that Friday. And I was talking to Mr. Cryer on the
22 phone, and we had, Mr. Campbell and I, had talked. You know,
23 the pretrial order to submit a -- you know, requested to submit
24 a suggested verdict form, which we did, which included those
25 willful failure to file counts as kind of a lesser included

1 theory.

2 THE COURT: It's not a "kind of a lesser included
3 theory." That was in fact my ruling, was it not?

4 MR. BECRAFT: Yes, Your Honor.

5 THE COURT: Just to make sure you understand what I
6 ruled. It's there.

7 MR. BECRAFT: I understand, Your Honor.

8 THE COURT: And we're eventually, I hope, going to
9 get to Federal Rule of Criminal Procedure 7C about whether your
10 client was misled and thereby became prejudiced. Now, that's
11 where I want to end up with, and I'm hearing a lot of hooey
12 getting to it. So let's move it.

13 MR. BECRAFT: Our posture last week, even last
14 Friday, was that Mr. Cryer no longer -- that's the reason why I
15 submitted requested jury instructions that no longer included
16 the lesser included offense. So we were going to ask that the
17 Court not. We were going to oppose submission of this case on
18 anything other than a tax evasion case. Now let me tell you
19 the reasons why that would be the case.

20 The Government argues that there's no prejudice to
21 us. Well, Mr. Cryer was preparing for trial on an evasion
22 count. The evasion count requires an affirmative act of
23 evasion. Our trial posture in reference to an evasion case was
24 going to be an attack upon that affirmative act. The
25 affirmative act in this particular indictment is this creation

1 of this trust and purported concealment of income from the
2 trust. Well, first and foremost, Your Honor, on that
3 affirmative act, the trust in question predated by more than a
4 year, you know, any tax problems for Mr. Cryer.

5 THE COURT: Whoa. Let me cut you off right there.
6 In ruling, I granted your motion to dismiss for duplicity but
7 found that the 7203 failure to file and pay taxes was a lesser
8 included offense within the evasion charges. Correct?

9 MR. BECRAFT: I understand that, Your Honor.

10 THE COURT: All right. Now, the Government comes in
11 and says: We're not doing 7201, we're now agreeing to do 7203
12 only. How does that prejudice you when you knew what the
13 lesser included offense was going to be and it was going to be
14 precisely the same proof?

15 MR. BECRAFT: First, Your Honor, we were going to
16 oppose submission of the case going --

17 THE COURT: I'm not talking about the jury. I'm
18 talking about going to trial, Mr. Becraft. I ruled that it was
19 a lesser included offense and would be going to the
20 instructions. You can object all you want to, but the ruling
21 was going to stand. Okay?

22 MR. BECRAFT: I understand that, Your Honor.

23 THE COURT: Let's get to today. Tell me how when
24 7203 on your motion became a lesser included offense pursuant
25 to my ruling, how your client is somehow misled and then

1 prejudiced thereby with the Government removing the felony
2 count and simply going with the lesser included misdemeanor
3 offenses? Real simple. Real straightforward. Let me hear it.

4 MR. BECRAFT: This is the answer. This is the -- in
5 light of the last-minute hour for which this argument comes up,
6 Your Honor, I can't cite any case authority. I can say this,
7 though. I think that the prejudice would be: No. 1, the
8 defense would during the course of the trial oppose submission
9 to this jury of a lesser included --

10 THE COURT: Yawn. Yawn. Yawn. Tell me how in
11 changing the indictment to go on 7203 only, the misdemeanor
12 count, the lesser included offense type, which is within the
13 7201 per my ruling, how is your client misled? How is the
14 burden of proof any different? How is anything any different,
15 except for the fact that your client no longer faces a felony?

16 MR. BECRAFT: Here's -- if I can, Your Honor --

17 THE COURT: I'm listening.

18 MR. BECRAFT: -- the prejudice --

19 THE COURT: I haven't heard it.

20 MR. BECRAFT: The prejudice is: No. 1, we would
21 oppose submission of this case to a jury --

22 THE COURT: Whoa. Sir, I am not at the jury trial
23 phase of this in terms of submission to the jury. I'm not
24 interested in what you plan to do at which time. I'm at the
25 here and now. Tell me how your client is misled and thereby

1 prejudiced under Federal Rule 7 by the Government's proposed
2 dismissal of its felony counts and going to trial on the lesser
3 included offense only of the misdemeanors under 7203?

4 MR. BECRAFT: And in response to that, Your Honor,
5 here's --

6 THE COURT: I'm listening. This is the fifth time --

7 MR. BECRAFT: (Indiscernible due to speaker overlap.)

8 THE COURT: -- I've asked the question --

9 MR. BECRAFT: (Indiscernible due to speaker overlap.)

10 THE COURT: -- Mr. Becraft.

11 MR. BECRAFT: The prej --

12 THE COURT: Silence. Answer the question. Don't
13 tell me what you're going to do about opposing something when
14 it goes to the jury. I want to know how the prejudice exists
15 now.

16 MR. BECRAFT: I will phrase it the best way I can,
17 Your Honor.

18 THE COURT: And don't tell me about going to the
19 jury.

20 MR. BECRAFT: Well, the prejudice in changing the
21 nature of the charge would be this: That the defendants would
22 be at a -- the defendant would be in a stronger position in
23 submitting the case to the jury on the evasion counts --

24 THE COURT: Would you prefer that we leave it as the
25 evasion and simply take the lesser included verdict with it?

1 MR. BECRAFT: I'm --

2 THE COURT: And risk a conviction on the felony
3 counts?

4 MR. BECRAFT: Your Honor --

5 THE COURT: Is that what you're telling me?

6 MR. BECRAFT: One of the things that our trial
7 posture was going to be, Your Honor, was to attack on the
8 evasion count and deal with the one affirmative act, which we
9 think that we have a strong chance of showing that there is no
10 affirmative act that transforms this case into an evasion case.

11 THE COURT: Bull you still have the lesser included
12 offenses that the jury could say: You know, we agree, so we're
13 going to find him guilty of failing to file and failing to pay
14 taxes.

15 MR. BECRAFT: Well, I've stated the case, Your Honor.

16 THE COURT: All we've done is just lop off a whole
17 bunch of proof and instead go real simple, straightforward,
18 seems to me, that certification of no taxes, no tax returns
19 filed from '90 -- what was it? 2000 and 2001. Real easy
20 certificate: Not filed, no taxes paid. Now we've taken all of
21 the other overhang, overlay, and simply stripped it away to the
22 misdemeanor counts. How does that prejudice you?

23 MR. BECRAFT: All I'm saying, Your Honor -- and I've
24 said it, and that's the extent of what I can argue in reference
25 to the prejudice. We believe that we'd have a better shot with

1 a jury with an evasion case because the affirmative act's so
2 weak.

3 THE COURT: Well, the Government's moved to dismiss
4 that. Now you're left with the lesser included offense. Tell
5 me how you're misled.

6 MR. BECRAFT: Well, the argument I had just told the
7 Court is how I think we're prejudiced, that alone.

8 THE COURT: That's it?

9 MR. BECRAFT: Yes, Your Honor.

10 THE COURT: I'm going to give you till 10:00,
11 Mr. Becraft, to review the cases that were submitted this
12 morning. We're going to reconvene at 10:00, and by that time,
13 since you have Mr. Harp here -- and, of course, your client is
14 also a licensed Louisiana attorney. You have a triumvirate, a
15 trio of people, that I expect to do two things: First of all,
16 review those cases, be prepared to discuss them. Second, you
17 need to explain to me how removing the felony count and only
18 going with the misdemeanor count legally prejudices your
19 client. Because I can simply continue this today, allow a
20 superseding indictment to be filed, stripping away all the
21 other stuff with the misdemeanors, and here we go. But, you
22 know, that's really not necessary since I've already ruled that
23 the superseding indictment language is a lesser included
24 offense and not a separate offense. You get my drift here?

25 MR. BECRAFT: I sure do, Your Honor, and we welcome

1 the opportunity.

2 THE COURT: All right. You have until 10:00 to
3 prepare. I expect you back here.

4 Mr. Campbell, you have provided copies of those cases
5 to --

6 MR. CAMPBELL: Yes, I have.

7 THE COURT: -- counsel?

8 Very well, gentlemen. I'll see you back at 10:00.

9 (Recess 9:02 - 10:03 a.m.)

10 THE COURT: Thank you. Please be seated.

11 Mr. Becraft, when we last met, I had given you time to look at
12 the citations offered by the Government in support of its
13 decision to proceed only on the lesser included offenses and
14 not to proceed on the felony evasion charges contained in the
15 indictment. Have you read those?

16 MR. BECRAFT: We have, Your Honor. We withdraw our
17 objections.

18 THE COURT: All right. Are we then ready to proceed
19 with trial today?

20 MR. BECRAFT: (Nods head.)

21 THE COURT: Do you see that there are any changes
22 from either side in how -- except for the jury verdict form
23 which is easily redacted -- insofar as it impacts the
24 stipulations that I got an unsigned copy of this morning?

25 MR. BECRAFT: It should not. The way we're

1 proceeding should not -- the stipulations will apply in either
2 case, Your Honor.

3 MR. CAMPBELL: Right.

4 THE COURT: All right. Joint neutral statement, same
5 thing?

6 MR. CAMPBELL: You have to change it from evasion to
7 failure to file.

8 THE COURT: And are you going to do that?

9 MR. CAMPBELL: Yes.

10 THE COURT: All right. And you'll present it when?

11 MR. CAMPBELL: I can present it before the jury, the
12 petit jury, is seated.

13 THE COURT: All right. If you'll be here at 1:15,
14 we'll take care of any last-minute housekeeping details. The
15 jury will be called here at 1:30. My decision was to postpone
16 their arrival because I wasn't sure what was going to happen in
17 the a.m. today. I didn't know whether we would be fully
18 resolved, and I do not wish to make people sit around together
19 downstairs, fuming at why they're not being called up in short
20 order.

21 Any other details that we need to consider at this
22 time from the Government's viewpoint?

23 MR. CAMPBELL: No, sir.

24 THE COURT: Mr. Becraft?

25 MR. BECRAFT: So we're going to select the jury at

1 1:30, Your Honor?

2 THE COURT: We will begin jury selection at 1:30.
3 They will be up here.

4 Just so that you will know, because we have 48 people
5 called, there will only be one available bench after they're
6 seated.

7 MR. BECRAFT: Your Honor, I've seen some people
8 outside. My instructions to them have been -- I thought we
9 were going to pick this morning. I will tell them again,
10 probably come back at 4:00.

11 THE COURT: Perfectly fine. But we'll have minimal
12 seating available for the public during jury selection because
13 of the number of jurors.

14 MR. BECRAFT: Your Honor, my message to them has been
15 we don't want any -- they don't need to be in the courtroom.

16 THE COURT: No cross pollination, as it were.

17 Mr. Campbell, you'll have a redacted indictment
18 prepared as well?

19 MR. CAMPBELL: Yes, I will.

20 THE COURT: And submitted to the Court?

21 MR. CAMPBELL: Yes, I will.

22 THE COURT: With nothing further, then, I will see
23 you gentlemen at 1:15 p.m. We are in recess until that time.

24 (Recess had 10:07 a.m. - 1:20 p.m.)

25

1 AFTERNOON SESSION

2 JULY 9, 2007

3 (Court called to order with Defendant present.)

4 THE COURT: Mr. Campbell, for the Government, you're
5 ready to proceed?

6 MR. CAMPBELL: Yes, Your Honor.

7 THE COURT: Mr. Becraft?

8 MR. BECRAFT: Yes, Your Honor.

9 THE COURT: All right. Any last minute housekeeping
10 details that we need to address before we get our prospective
11 jurors up here and seated?

12 MR. CAMPBELL: Briefly, Your Honor, during the recess
13 I submitted to chambers and to defense counsel a redrafted
14 joint neutral statement to reflect the lesser included charges
15 of 7203 and also a redacted indictment to reflect the lesser
16 included charges as well.

17 THE COURT: And is it the pleasure of counsel for me,
18 as preliminary remarks to prospective jurors, that I read the
19 redacted indictment or the joint neutral statement?

20 MR. CAMPBELL: The joint neutral statement is fine.

21 MR. BECRAFT: That's fine with me, Your Honor.

22 THE COURT: All right. Any change to the stipulation
23 that was provided to my office?

24 MR. CAMPBELL: Yes. I think I submitted to
25 Mr. Becraft --

1 THE COURT: Do you want to submit that at the
2 appropriate time --

3 MR. BECRAFT: At the appropriate --

4 THE COURT: -- at the evidentiary phase?

5 MR. BECRAFT: -- time, Your Honor.

6 MR. CAMPBELL: And if there are no objections, I
7 would ask that the Court read the stipulations to the jury at
8 the close of opening statements, right before the first witness
9 testifies.

10 THE COURT: All right. Becky, if you'll help me to
11 remember to do that at that time.

12 I appears to me that we stand a substantial
13 likelihood of seating a jury not later than 4:00 to 4:30, at
14 which time I would prefer to do opening statements before we
15 dismiss the jury so that we begin tomorrow with the first
16 witness for the government. Is that possible?

17 MR. BECRAFT: I'm prepared, Your Honor.

18 THE COURT: Mr. Campbell?

19 MR. CAMPBELL: I'm prepared, Your Honor.

20 THE COURT: All right. We'll see how it goes, but
21 that's my preference at this point.

22 All right. In this instance, gentlemen, in preparing
23 the voir dire questions to the entire venire, I'm going to read
24 the complete superseding indictment; and once we get the jury
25 actually seated, we'll read the joint neutral statement. And

1 we'll proceed along those lines.

2 Any objection or other thing that we need to take up
3 before we get our group of prospective jurors in?

4 MR. BECRAFT: None, Your Honor.

5 MR. CAMPBELL: None from the Government.

6 THE COURT: All right. We have one juror that has
7 not reported, so we'll hang loose for just a few more minutes.

8 Counsel, Mr. Borseth, who is on your seating chart as
9 Juror Seat No. 27 is 30 minutes late. I am going to proceed in
10 his absence and have him sit in the jury assembly room for the
11 rest of the day. I'm not going to bring him up midstream.

12 MR. BECRAFT: No objection.

13 THE COURT: Mr. Campbell, any objection to that
14 procedure?

15 MR. CAMPBELL: No, sir.

16 (Whereupon, the venire enters and voir
17 dire is conducted on the record.)

18 THE COURT: Counsel, do we have any preliminary
19 issues to cover before beginning opening statements this
20 afternoon? Mr. Campbell?

21 MR. CAMPBELL: None from the Government, Your Honor.

22 THE COURT: Mr. Becraft?

23 MR. BECRAFT: Nothing from the defense.

24 THE COURT: Ladies and gentlemen, we will proceed
25 with opening statements in this matter.

1 Mr. Campbell, you have a total of 15 minutes in order
2 to make your opening statements.

3 After which time, ladies and gentlemen, the defendant
4 will then follow with any opening statement to be made.

5 Mr. Becraft will be the one to do that, if he chooses to do
6 that. After that, we will then adjourn for the day.

7 Mr. Campbell, you may begin when you're ready, sir.

8 OPENING STATEMENT BY THE GOVERNMENT

9 MR. CAMPBELL: May it please the Court. Members of
10 the defense table. Ladies and gentlemen of the jury.

11 Before I begin with the substance of my opening
12 statement, first I'd like to apologize for the quality of my
13 voice. It appears that I picked the wrong time of the year to
14 catch a cold. And if anybody know, probably the worst cold to
15 ever catch is a summer cold. So, again, I want to apologize
16 for the hoarseness of my voice.

17 "But nothing in life is certainly but death and
18 taxes." Benjamin Franklin. Taxes, nobody likes to talk about
19 them, nobody likes to hear about them, nobody likes to think
20 about them, especially if you owe and have to pay them. So I'm
21 not going to spend my opening statement trying to give you some
22 civic lecture about how it's a civic duty to pay taxes and how
23 important it is to pay taxes, because I don't have to tell you
24 something that you already know. And regardless of our
25 attitudes about taxes, the fact that we don't like to pay taxes

1 and, of course, we like to keep our money in our pockets, the
2 truth is that, under the law, if you meet certain requirements,
3 you have to file a tax return and you have to pay taxes.
4 That's the law. And regardless of how we may feel about that,
5 it is our duty to follow the law.

6 Now, what you're going to hear today in this case is
7 about the defendant, Tommy K. Cryer, and the Government will
8 show beyond a reasonable doubt that in this case the defendant
9 decided not to follow the law. He decided not to follow the
10 law by not filing his tax returns and by not paying the taxes
11 that are required of him. And that is basically the element --
12 the essence of the charges in the indictment. There are two
13 counts, failure to file taxes and failure to pay taxes, which
14 are both similar and which both acts are pleaded in Count 1 and
15 Count 2 of the indictment. Count 1 deals with the tax year
16 2000. Count 2 deals with the tax year of 2001.

17 Now, let's talk about the defendant, Tommy Cryer.
18 You're going to hear that Tommy Cryer is a 1973 graduate of LSU
19 Law Center. You're going to hear that he's a practicing
20 attorney here in Shreveport, Louisiana. He owns and operates
21 his own law practice, Tommy K. Cryer, Attorney At Law, which is
22 located here in Shreveport. He has one employee.

23 You will hear that from 1997 -- excuse me, from 1993
24 to 2 -- to the present, he hasn't filed a tax return. You will
25 hear that from 1993 to the present that he hasn't paid federal

1 taxes. Hasn't filed a federal tax return, hasn't paid federal
2 taxes. You're also going to hear evidence to show that from
3 1997 to 2001 the defendant earned a combined gross income from
4 his law practice somewhere between \$766,000 to \$783,000,
5 somewhere in that range, the high end and the low end, and he
6 paid zero federal income taxes on the money that he earned.

7 Now, the law treats tax offenses different from other
8 kinds of offenses when it comes to the state of mind that the
9 government has to prove. For example, if someone is charged
10 with, let's say, burglary, I do not have to prove that the
11 defendant knew that it was against some state statute or
12 against some federal statute or duty or obligation not to
13 commit a burglary. Only thing I would have to prove is that
14 the person intended to burglarize someone's home and prove it
15 beyond a reasonable doubt. It doesn't work that way with tax
16 cases. In tax cases, I have to show that the person was aware
17 of some legal duty -- and in this case, he was aware of the
18 legal duty to file a tax return and was aware of a legal duty
19 to pay taxes -- and yet chose not to follow that legal duty.
20 To sum up, that's what we call willfulness. It's a greater
21 state of mind that I have to prove in this case than in your
22 normal criminal cases.

23 Now, what evidence you're going to hear today to show
24 that the defendant acted willfully, in other words, this is not
25 some case where he mistakenly didn't file his taxes or it was

1 inadvertence or it was by accident, that it was willful?
2 You're going to hear and see in some of the documents that
3 you'll see that the IRS sent the defendant delinquency notices
4 letting him know that you're behind, you haven't paid your
5 taxes, putting him on notice. You're going to hear that up to
6 1993, that prior to that the defendant did file federal income
7 taxes and tax returns. So it's not a situation where he hadn't
8 filed. He did file up till 1993.

9 You're also going to hear that in the years that we
10 charged, 2000 and 2001, the defendant submitted the 941 returns
11 for his legal assistant. And basically, these are quarterly
12 returns that the law requires that employers submit to the IRS
13 for your withholdings. So, for example, your FICA
14 withholdings, every quarter your employer has to submit those
15 withholdings to the IRS out of your check. And they do it four
16 times a year, once for every quarter. You're going to hear the
17 defendant in 2000 and 2001 did the quarterly withholdings for
18 his employee; withheld her taxes out of her check and sent them
19 to the IRS according to the law.

20 As I told you earlier, the defendant is a 1973
21 graduate of LSU Law Center. Been practicing law for a long
22 time. Certainly based on that education and knowledge and
23 experience, it's going to show you that the defendant was well
24 aware of his obligation to file taxes and to pay federal taxes.
25 The date of April 15, everybody know what's special about

1 April 15. That's the day everybody's running around like
2 chickens with their heads cut off trying to get everything
3 together to pay those taxes, because that's a legal obligation,
4 a legal duty that they have to fulfill. And the evidence will
5 show that the defendant chose not to do that in this case.

6 Now, in what form are you going to hear and see this
7 evidence? You're going to see various documents to show that
8 defendant didn't file the tax returns, you're going to see
9 various documents to show that he was given these delinquency
10 notices, and you're going to see some of the 941 quarterly
11 returns that he filed on behalf of his legal assistant, his
12 secretary, that works for him.

13 You're also going to hear from George McGovern. He's
14 a local CPA here and he did the defendant's accounting work as
15 far as looking at his bank statements for his law firm to see
16 how much money the firm took in, how many deductions were
17 applicable and so forth, and came up with some calculations
18 from 1997 to 2001 to show exactly what the defendant's tax
19 liability was.

20 You're also going to hear from Gloria Worthey, who
21 worked for the defendant. And she's going to tell you about
22 the law firm and also tell you about her quarterly returns.

23 And then, finally, you're going to hear from Agent
24 Jimmy Sandefur, who works for the IRS, and he's what we call a
25 summary witness. He's going to sum all of this up for you.

1 And, also, he's going to show you what some of his calculations
2 reveal as far as the defendant's tax liability and what he owes
3 in federal income taxes.

4 So at the conclusion of this case, the Government
5 will ask you to return verdicts of guilty as charged, because
6 all of the evidence will show beyond a reasonable doubt that
7 the defendant willfully for 2000 and 2001 failed to file
8 federal tax returns as required by law and failed to pay his
9 taxes, federal taxes, as required by law. Thank you.

10 THE COURT: Thank you. Mr. Becraft?

11 OPENING STATEMENT BY DEFENDANT

12 MR. BECRAFT: May it please the Court. Mr. Campbell.
13 Ladies and gentlemen of the jury.

14 Let me reduce myself. I'm Larry Becraft. I'm a
15 criminal defense attorney. And I'm going to be assisted by
16 that man right there (indicating), George Harp. It is our job
17 to come in here to defend Tommy Cryer. So what you have --
18 when you look at us sitting over there on that side of the
19 room, you've got two lawyers and in the center is the
20 defendant, a lawyer. And you might think: How in the world
21 would a lawyer get involved in something like this?

22 Mr. Cryer is charged with two counts of willful
23 failure to file income tax returns. You're going to see in
24 this case that -- as Mr. Campbell pointed out a minute ago,
25 we're going to have George McGovern to get up here and he's

1 going to testify about what Mr. Cryer made. We're going to
2 have Mr. Sandefur get up here; he's going to testify about what
3 he made, deductions, and everything else. Ladies and
4 gentlemen, let me be brutally frank and blunt: Most of this
5 case is not about the government's proof. You know, I hate to
6 sit there and say: Well, I'll probably be twiddling my thumbs.
7 But a lot of it, probably most of it, of the government's case
8 is not going to be contested. But that doesn't mean that this
9 is not a disputed case. It is, ladies and gentlemen, a very
10 disputed case.

11 One of the things that is going to be critically
12 important for you, as Mr. Campbell was stating a moment ago, we
13 have this element known as willfulness. He's got to show, you
14 know, that things were done by Mr. Cryer willfully. Well,
15 ladies and gentlemen, that's what I label the criminal state of
16 mind, and that's what's at issue in this case: Did Tommy Cryer
17 have that criminal state of mind in order to be convicted of
18 these offenses, or did he not have that criminal state of mind?
19 And the defense suggests to you, ladies and gentlemen, that the
20 evidence in this case will be that Tommy Cryer did not act
21 willfully; that Tommy Cryer did not act with the criminal state
22 of mind in order to be found guilty of these offenses.

23 Now, let me quickly kind of summarize for you, if I
24 can, what the facts of this case will be.

25 Tommy Cryer was born in 1949 in Lake Charles,

1 Louisiana. Sometime before he got out of grade school, his
2 family, which included six other brothers and sisters and his
3 parents, moved from Lake Charles about 25 miles out of town to
4 a farm, and that's where Tommy Cryer grew up a farm boy. And
5 we all know what farm boys can be. Got a lot of
6 responsibility. And Tommy Cryer decided at an early age that
7 he wanted to become a lawyer. Well, becoming a lawyer is not
8 something that's easy, especially if you're in his
9 circumstances, the son of a farmer. And by his bootstraps,
10 Tommy Cryer went to a local college, paid his own way, and then
11 he works his way through law school. And Tommy Cryer was so
12 interested in learning, it's my recollection that he graduated
13 with honors from undergraduate school and he also had a very
14 high ranking -- it may have been cum laude -- from law school,
15 and he was in a prestigious organization in law school known as
16 the Order of the Coif. Now, that, ladies and gentlemen, is
17 somebody that's extraordinary. And may I suggest to you that
18 that's exactly what Tommy Cryer is. He's different, he's
19 smart, and he worked hard.

20 After he got out of law school, he worked for a
21 couple months for a Louisiana constitution commission. Then he
22 got a job up here in Shreveport, took the bar exam, passed, and
23 worked for a firm here in town that no longer exists, the
24 Hargrove law firm. And after he got out -- after he spent
25 about two years working for Hargrove, he went out on what we

1 call solo practice. He was on his own. And from that time
2 forward, which would be about 1975 all the way up through last
3 week, Tommy Cryer has been in solo practice of law.

4 As Mr. Campbell mentioned moments ago, Mr. Cryer, you
5 know, when he gets up here and testifies, he's going to say:
6 Hey, in law school, I didn't learn anything about taxes.
7 There's an elective course you can take. I didn't take it.
8 Wasn't interested in it. And like most everybody else in
9 America, he just simply, with no training, a lawyer with no
10 training in taxes, just simply did what everybody else did.
11 But there came a day.

12 This is a couple of weeks after Mr. Cryer sends in a
13 check for about almost \$4,000. I think the check is in June of
14 '94, and sometime in late June or maybe July of '94 Mr. Cryer
15 is going to lunch and one of the parties that's in his luncheon
16 group is a man by the name of Jan Holland. And Jan Holland
17 started some discussions, and he brought up the point: Well,
18 Mr. Cryer, you are a lawyer. I'm not a lawyer, but I studied
19 the tax laws. Gee, you know, is it possible that you may not
20 owe the tax? Is it possible that you might not be required to
21 file a return? And when this -- when this was told by Mr. Jan
22 Holland --

23 THE COURT: Mr. Becraft, in your opening, restrict it
24 to the evidence that will be presented without the shading.
25 Second, you're into hearsay testimony and I haven't heard word

1 one from the defendant at all about introducing that witness
2 that you just referred to, his testimony, and you will not.
3 Proceed.

4 MR. BECRAFT: What Mr. Cryer learned from having
5 conversations with Jan Holland is this: If there's a position,
6 you've got to look at the tax law --

7 THE COURT: And that's still hearsay as a --

8 MR. CAMPBELL: Okay.

9 THE COURT: -- response and it's not going to come
10 into evidence and cannot come into evidence, Mr. Becraft. Move
11 on.

12 MR. BECRAFT: Having his interest piqued in a study
13 of the tax laws, Mr. Cryer went to the law library and started
14 looking around for a section of the Internal Revenue Code that
15 made him liable. He hopped out of court one day sometime in
16 July, maybe August of 1994, runs up to the law library, pulls
17 out the Internal Revenue Code, starts flipping through there,
18 wanting to try to find the statute that makes him liable, and
19 doesn't find it on this occasion. And later on Mr. Cryer says:
20 Well, I just -- I've got to find this. And he continues to
21 look. And after a couple of weeks, Mr. Cryer says: I've got
22 to get a copy of the Internal Revenue Code. He gets a copy of
23 the Internal Revenue Code, and I think his testimony will be
24 that, you know, maybe it might be August or September of 1994
25 he has his, this Internal Revenue Code, he's been up at the law

1 library looking for the statute that makes him liable. He now
2 has an Internal Revenue Code and he spends three or four nights
3 combing through the Internal Revenue Code looking for what he
4 thought was there. And what he thought was there was a statute
5 that made him, a citizen living here in Louisiana, liable for
6 the federal income tax. And Mr. Cryer concluded there is no
7 such statute. Based on his training and understanding of the
8 law, he believed that the absence of that statute, the logical
9 consequence of that was that he wasn't required to file an
10 income tax return.

11 That, ladies and gentlemen, is what this case is
12 about. It's intent. It's beliefs. There's going to be a
13 couple of other beliefs. We don't have the time this
14 afternoon. I think I made a promise to the Court to try to
15 shut down before 5:00. But Mr. Cryer has done more than just
16 study the Internal Revenue Code. He has spent a great deal of
17 time, he spent a great deal of time in '95 and again in 1999,
18 doing what somebody like him, the Order of the Coif, you know,
19 one of those guys from law school that had high grades, digging
20 in and learning the law in a field that he had never looked at
21 before, and he reached these conclusions: I'm not liable for
22 the federal income tax. He reached this conclusion, this
23 belief, ladies and gentlemen, that his money that he received,
24 his fees from working as a lawyer, did not constitute income.

25 Now, ladies and gentlemen, when Mr. Cryer gets up on

1 the stand, I want -- I want to make this perfectly clear: The
2 Court is going to be giving the jury the instructions on the
3 law in this case, not Mr. Cryer. What Mr. Cryer will give to
4 you is his testimony. And what he will give to you is his
5 belief about what the law is. And that belief is, encompasses
6 these beliefs: He believes sincerely that he is not required
7 to file income tax returns because he's not liable for the
8 federal income tax. He sincerely believes he's not required to
9 file income tax returns because his fees do not constitute
10 income. And there's going to be a couple of other arguments
11 he's going to lay out in his testimony. But once you hear that
12 testimony, it will be perfectly clear, crystal clear, ladies
13 and gentlemen, that the missing element in this case, what the
14 government cannot prove, is that Mr. Cryer acted with criminal
15 state of mind essential for conviction. And in the absence of
16 that, and in fact, with overwhelming proof that he acted in
17 good faith, it'll be your duty to acquit Tommy Cryer on both
18 counts of this indictment.

19 Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Becraft.

21 Ladies and gentlemen, it's shortly after 5:00 and
22 we're going to adjourn at this particular point of the evening.
23 Typically, I allow the juror living the farthest from the
24 courthouse to pick our start and stop times each day. Is 9:00
25 an agreeable time tomorrow to begin? Does anyone have any

1 difficulty or perceived difficulty in making it for 9:00?

2 (No audible response.)

3 THE COURT: I'd like you here for 8:45. In a moment
4 we will dismiss and our court security officer will take you to
5 the jury assembly room which is where you will report to in the
6 morning not later than 8:45, and we will begin with testimony
7 promptly at 9:00 in the morning. A couple of cautionary
8 instructions:

9 Do not talk about this with anyone. You have not
10 heard any evidence yet. You may think you know what the case
11 is about. You have heard only the outline of what that party
12 intends to prove. Whether it's proved or not will be totally
13 up to you.

14 Do not listen to newscasts tonight. Don't listen to
15 the radio tonight on a newscast. Don't pick up the newspaper
16 and read through it. For tomorrow morning, just ignore those
17 particular pieces of the media. We need you fair and
18 impartial, with no one trying to shade any information or
19 provide you with any information about anything having to do
20 with this case.

21 So with that, we are going to adjourn, and I will
22 hope to see everybody in the jury room by 8:45 in the morning
23 to start promptly at 9:00.

24 All rise for the jury.

25 (Jury exits courtroom.)

1 THE COURT: All right. Before we adjourn today, any
2 details, housekeeping that needs to be taken up this afternoon?

3 MR. BECRAFT: None, Your Honor.

4 MR. CAMPBELL: No, sir.

5 THE COURT: Very well. We will be here ready to
6 proceed at 8:45 in the morning. We will address anything that
7 may have popped up overnight. We're adjourned.

8 MR. BECRAFT: Have a good evening, Your Honor.

9 (Proceedings adjourned at 5:05 p.m.)

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I, Marie Moran Runyon, Official Court Reporter, do hereby certify that the foregoing pages numbered 1 through 36 do constitute a true and correct record of proceedings had in said trial to the best of my ability and understanding.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Subscribed and sworn to this 14th day of August, 2007.

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