

‘SO WADDAYA WANNA DO, MAKE A FEDERAL CASE OUT OF IT?’ DEFENDING FEDERAL TAX PROSECUTIONS

BY DONALD W. “MAC” MACPHERSON



It was 9 AM on an ordinary Monday, a hot and sunny day in Phoenix. My client Jim Carroll was working in his garage with the overhead door wide open when, unannounced, an IRS Revenue Officer appeared. He was there to attempt collection of unpaid taxes. Unlike the typical m.o. of Special Agents – the ones with the guns and badges who investigate criminal tax cases – he had not appeared before Jim’s caffeine intake time of 6 AM, nor at 7 PM, after Jim had eaten dinner and was relaxing with a glass of wine. But the collection officer had not bothered with a telephone interview or an appointment either, instead sneaking up on Jim and hoping to catch him off-guard.

Jim engaged in a friendly conversation with the officer and made clear that the conversation was concluded. No agreement was reached, and the officer could put whatever further he had to say in writing. Jim then began to pull the garage door from the ceiling down to the ground, which caused him to take a step forward. His large, protruding belly bumped the large, protruding belly of the officer. Jim was charged with assault on an IRS officer, charges later changed to “intimidation,” a five-year felony under 26 U.S.C §7212, the officer claiming a chest-shove, a physical impossibility given the matching pot bellies. I interviewed Jim at his home and had him re-enact his encounter with the officer, my son Ryan taking photos as evidence for the trial.

Our defense to what we called “the stomach bumping case” was simple: no crime committed. Jim had no intention of intimidating much less assaulting the officer. The stomach bump was simply a result of two large men concluding a conversation. After all, in his report to the prosecutor the officer had not claimed that Jim attempted to hit him in the head with the garage door or otherwise harm him. Obvious to us: the officer purposefully

retaliated for Jim’s exercise of his constitutional right to refuse a surprise collection examination at his garage on a Monday morning. But the officer provided us with more for our defense. *Far more.*

Jim described the officer as at least six feet two inches tall, husky and well built. Jim was but five feet six inches tall and did not in the least bit appear intimidating. Thus, our defense: select lots of women for the jury and appeal to the ego of the officer, trusting that he would not admit before women jurors that he was intimidated by Jim. If he claimed otherwise, he would appear to be a liar.

During jury selection we were able to select several women. The officer was the only government witness, and he accurately recited the facts. With permission of Judge Hardy, on cross-examination I asked the officer to step down from the witness chair and stand before the jury box. I had Bob stand, facing the officer, with their bellies almost touching. Appealing to his ego, I asked the officer, “You were not in the least bit intimidated by my client, were you?” “No,” was his honest answer. Had he answered otherwise; he would have appeared not only ridiculous but a liar. I moved for judgment of acquittal for lack of evidence of intimidation. Judge Hardy immediately granted my motion. *Case closed.*

Recent Tax Prosecution Headlines

In recent months the news headlines have included high-profile federal tax prosecutions, from the former attorney of President Donald Trump, Michael Cohen, and the President’s former Campaign Manager, Paul Manafort, to attorney Michael Avenatti, said to be a “provocateur” of the President for Avenatti’s public claim of the President’s “hush money” payment of \$130,000, through attorney Cohen, to adult-film actress Stormy Daniel. Consider also the recent “Varsity Blues” prosecutions in which fifty defendants, of whom thirty-three are parents, including Hollywood Stars and prominent business leaders, are charged with bribing university officials with as much as \$1.2M for admission

of their child to a prestigious school.

Rumor has it: *tax charges* will be added if the “Varsity Blues” defendants refuse to plea to the current non-tax charges of conspiracy and mail fraud. After all, any payment made to a university as a bribe does not satisfy the test of “no benefit to the donor” required for the charitable deduction to be taken on the tax return and can therefore result in a charge of attempted tax evasion under §7201, a five-year felony. As is often the case: financial crimes encompass tax crimes; thus, many public figures and others are charged with tax crimes in conjunction with other financial crimes. For example, the crimes of embezzlement, kickbacks, and fraud result in unreported income.

From Ordinary Citizens to the Rich and Famous

Whether the federal tax prosecution be brought against the ordinary citizen or the rich and famous – ranging from mobster Al Capone, former Vice President Spiro Agnew, and singer Jerry Lee Lewis to professional baseball star Pete Rose, Hollywood star Wesley Snipes, and Tax Court Judge Diane Kroupa – just what must a prosecutor prove beyond a reasonable doubt? And what are the viable defenses?

In all criminal tax cases the government must prove specific criminal intent, a.k.a. *willfulness*: that the defendant knew and understood the law, and specifically set out to violate it. As to defenses, generally, as with most white-collar crimes, often the defense is: admit to the act but deny the crime; i.e., assert that the prosecutor has failed to prove intent. In 1991 the Supreme Court, resolving circuit conflicts, made clear in the *Cheek* case that *good faith belief or misunderstanding that the*

law is not violated negates willfulness, regardless of whether the belief or misunderstanding is objectively reasonable. As to filed returns, the attempted *zinger* relied upon by prosecutors is the *jurat*, the statement above the signature line on the tax return: “Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and ... they are true, correct, and complete.” But for the defense, this portion of the *jurat*: “to the best of my knowledge and belief.” *Knowledge and belief.* Which opens the door to lack of willfulness for reason of belief based on *reliance*. Whatever caused the defendant to form the belief claimed is relevant, including what the defendant read and was told, especially if the defendant relied upon the advice of a CPA or tax attorney. The basis for the belief is not hearsay because it is not offered for the truth of the matter asserted but rather is offered for *state of mind*.

What Are Your Chances of Being Prosecuted?

With 150 million returns filed each year, IRS has a daunting task in its objective of securing “voluntary compliance” with the tax laws – deterring those who might dare snub their nose. Each year only 4,000 Americans are recommended for prosecution and only 2,000 are prosecuted. But the conviction rate is high, at over 90%, high because investigators and prosecutors cherry pick their cases while defense attorneys accept their clients as they find them. Moreover, in order to accomplish its goals, IRS often chooses high-profile cases. Is it mere coincidence that high-profile

attorney Michail Avenatti was recently indicted on tax charges four days before April 15th?

The arsenal of federal tax and tax related crimes includes: misdemeanor failure to file a return plus felony charges of filing a false tax return, attempted evasion of assessment or collection of the tax, interference with IRS, mail fraud and wire fraud, bank fraud if a false return is submitted in effort to obtain a loan, money laundering, and conspiracy. The mainstay defense is lack of willfulness. Less common: *constitutional challenges* ...

\$50,000 Cash Stuffed in a Paper Bag

The right to due process of law under the *Fifth Amendment, U.S. Constitution*, proved a viable defense in a major drug money laundering case involving two Phoenix attorneys. Having received information that an attorney was laundering drug money, the FBI proceeded with a Phoenix sting operation in which a government informant, Reynolds, and an undercover FBI agent, Miller, posed as cocaine dealers. One of the attorneys flew to the Caymans – with, unknown to the attorney, an undercover IRS Special Agent in tow – and visited the offices of U.S. Tax Planning Services, Ltd. (USTP) which supplied offshore companies and bank accounts, with no questions asked as to the origin of deposited funds. The attorney arranged for formation of a Cayman investment company, Anderex, and establishment of a Cayman bank account for the company, plus the delivery of the cash drug proceeds from Miller to USTP's office in Irvine, California for facilitation in the transfer of cash from Phoenix to the Caymans. Soon after and unannounced, Miller appeared in Irvine at my client's front door with \$50,000 in cash, stuffed in a paper bag...

My client was twenty-four year old Jack Bryan who worked for his father Jim Bryan who owned and controlled USTP. Jack and his young assistant and friend Larry Schmidt were told by an Atlanta attorney, later indicted in Atlanta, that banks would not file a currency transaction report (CTR) for sums less than \$10,000. Therefore, using fictitious names, with the \$50,000 in cash they purchased six cashiers checks payable to Anderex, all in amounts less than \$10,000, and mailed the checks to the Caymans for deposit in the Anderex account. Jack told Reynolds that he could “funnel a lot of money” out of the country, and return the funds to Reynolds by “loans,” which he ultimately did.

Later Jack and Larry were asked to visit with Reynolds and Miller at a resort in Phoenix.

During the meeting Reynolds made clear their business: cocaine dealers. The meeting was surreptitiously videotaped. Caught in a federal sting operation, Jack, Larry, and the two attorneys were indicted with conspiracy to conceal and concealing material facts in a matter within the jurisdiction of the IRS, Counts I and II, plus wire fraud, counts III and IV. The concealed facts were the existence, source, and transfer of cash from Phoenix to the Caymans without the filing of CTRs, and the return of the money to Phoenix as non-traceable loans. I was retained by Jack and Larry and I brought in my long-time friend and colleague “Wild Bill” Cohan of California to represent Larry.

After attending a release hearing, I was driving Bill to the Phoenix airport when he announced in his matter of fact style: “No crime committed.” I said, “What, are you crazy? These guys knowingly and intentionally laundered drug money to the Caymans, funneled it back to Phoenix as ‘loans,’ and you say, ‘No crime committed!’” Bill explained that there was no law which prohibited structuring, which was true at the time. It was this and a similar case which later caused Congress to make it a crime to structure for the purpose of avoiding the CTR.

Originally the grand jury alleged that by causing the failure to file CTRs our clients had attempted tax evasion, an object of the conspiracy and part of the scheme to defraud. But through pre-trial motions Bill and I pointed out that this was impossible because the last overt act of the alleged conspiracy was in January, long before the filing date of April. By superseding indictment, the government reduced the conspiracy from four objects to two, in which there was no mention of tax evasion. Chess game on.

Read the full story at <https://attorneyatlaw-magazine.com/defending-federal-tax-prosecutions>.



DONALD W. “MAC” MACPHERSON HAS BEEN IN PRACTICE FOR OVER 40 YEARS. HIS FORMER CLIENTS INCLUDE TWO GOVERNORS, THREE STATE SENATORS, CIA OPERATIVES, A HOLLYWOOD STAR, AND A MAJOR U.S. AIRLINE. MAC IS CERTIFIED BY THE ARIZONA STATE BAR AS A SPECIALIST IN BOTH TAX LAW AND CRIMINAL LAW. HE HAS WRITTEN THREE TAX BOOKS AND TRIED 55 CRIMINAL TAX CASES IN FEDERAL COURT IN 25 STATES SEE MORE AT WWW.BEAT-IRS.COM.

Yet the government's position was still unclear: did the scheme involve the loan transactions or the CTRs? The court refused to require the government to answer more specifically, and the case proceeded to trial without clarification on the record as to the *object* of the conspiracy and *scheme* to defraud by wire. The end result was - as we later argued to the 9th Circuit - that "the case was tried and the defendants convicted on but one scheme, one founded upon the currency transaction violations." As to those violations, the 9th Circuit acquitted all defendants, finding that to uphold the convictions would violate the *fair warning requirements of the due process clause of the Fifth Amendment*. But that did not end the case...

The 9th Circuit found that there was no reporting requirement, thus no crime under Counts I and II, the conspiracy and "concealing a material matter within the jurisdiction of the IRS" charges. In addressing the two wire fraud counts, the court stated that those also must be dismissed "since the appellants have not illegally concealed a matter within the jurisdiction of the IRS. The wire transfer of funds from the Cayman Islands to Phoenix could not have furthered a scheme to defraud the IRS." In its petition for rehearing, the government urged that the wire fraud schemes alleged in Counts III and IV were different from and independent of any concealment of material facts from IRS as alleged in Counts I and II because the wire fraud schemes involved "converting income into a loan through the use of a sham Caymanian corporation." But here is where the government had shot itself in the foot...

In its effort to avoid the tax issues which we had raised pretrial, the government had totally abandoned any scheme but for the CTR scheme. In fact, we had succeeded in obtaining an answer from the government to our Motion for Bill of Particulars, an answer in which the government stated that the wire fraud counts "are the substantive violations" of the conspiracy count and since the conspiracy count had nothing to do with tax fraud and evasion and only with CTRs, it logically followed that the wire fraud counts must fall with the conspiracy count. *Chess game won*. "Again," I wrote before the 9th Circuit, "the only objects of the conspiracy count to which the wire fraud counts are inextricably tied, were: objects regarding currency transaction reports." The government did not succeed in its attempt to switch horses mid-stream; the court apparently saw right through the government's lame attempt to do so and denied the petition for rehearing. The government did not attempt to seek a rehearing *en banc*, nor did it petition the U.S. Supreme Court for a *writ of certiorari*.

While the constitutional right to due process saved the day for Jack, Larry, and the two Phoenix attorneys, it was the rarely utilized *First Amendment* right to petition for redress of grievances that I employed in my next case...

A Texas Housewife Prosecutes Two IRS Special Agents

It was an ordinary day at the home of housewife and mother of three Jean C. Hylton in Wallisville, Texas when two IRS Special Agents - the guys with the guns and badges - appeared at her front door asking questions about her young son David who had not filed tax returns. Jean, married to the well-known and outspoken, fundamentalist preacher V.R. Hylton, well knew her rights and refused to cooperate with the agents' inquiries as to the whereabouts of David. In fact, recording the conversation, she repeatedly told the agents that they were trespassing in violation of state law. She pointed out that in coming upon the property they had passed numerous "Posted - No Trespassing" signs. (Later at trial the agents would lie, denying having seen such signs, all seven of

them.) Finally the agents left, leaving with Jean business cards, which she promptly took to the Chamber County Justice of the Peace with whom she filed criminal charges.

More intimidated by the Hyltons than by IRS because V.R. had filed a million-dollar suit against the county, County Attorney Jensen charged the federal agents with trespass and had them arrested and post bond. *IRS criminal investigators charged and arrested as the result of a housewife's complaint?* IRS quickly retaliated: for the filing of her criminal complaint against the agents, Jean was charged in federal court with Count I, corruptly impeding a federal tax investigation, and Count II, willfully obstructing justice, each five-year felonies. IRS claimed she lied about the no trespassing signs.

The agents moved that their case be transferred to federal court and the motion was granted, with assignment to Judge Gibson in Galveston. Jensen agreed that during trial I should assist both him and Jean, his complainant, at the prosecution table, a highly unusual turn of events, and likely the first for any criminal tax defense attorney: a complainant/federal defendant and her attorney assisting in the prosecution of IRS Special Agents who would later testify in the federal criminal trial of the complainant. At the close of the evidence Judge Gibson granted acquittal because the agents were acting within the scope of their federal duties and thus were immune to a trespassing charge under state law. Jean's trial was next...

I filed a motion to dismiss on grounds that the prosecution was barred by Jean's exercise of her *First Amendment* right to petition her government for redress of grievances, but the motion was denied. My motion to dismiss the obstruction of justice charge for prosecutorial misconduct and grand jury abuse resulted in voluntary dismissal by the prosecutor. Count II charged that Jean obstructed justice by interfering with the witness about to give evidence to the IRS agents who were investigating a suspect. *Impossible*. As declared by the 5th Circuit case of *Cameron* in 1972, the witness and the suspect cannot be one and the same. David was both the witness and the suspect. *Any prosecutor can indict a ham sandwich*. At the evidentiary hearing on my motion I examined the prosecutor who provided nothing but lame excuses for Count II, but the court none the less denied my request for dismissal.

Also denied: my *motion in limine* regarding claimed evidence of Jean's related illegal activities. "Leaders of a semi-organized tax rebellion movement," is how the prosecutor described Jean and her husband V.R., who had years previously been charged and convicted of obstruction of justice but received probation from Judge Gibson. A Deputy U.S. Marshall would testify that when he arrested V.R., Jean had attacked the deputy by grabbing him around the neck and choking him. Strange: Jean was not charged with assault.

With all of the highly prejudicial evidence to be admitted against Jean, she waived her right to jury trial. However, a jury trial it was to be, at the insistence of the prosecutor. At trial the deputy erroneously claimed it was Jean who assaulted him. Therefore, in an effort to demonstrate the lack of the deputy's identification skills, I brought out that he incorrectly identified a man who the deputy swore was part of the arrest of V.R. scuffle. Warix was the man involved in the scuffle, but the deputy identified Warix as Campbell, an airline pilot and V.R.'s good friend. Therefore, I had Campbell sit in the front row at trial, while Warix waited in the hallway. During my cross-

examination of the deputy I pinned him down - etched in stone; to absolute certainty - his identification of Campbell. I brought in Warix whom the deputy adamantly identified as Campbell. After Warix left the courtroom, I asked the deputy if he recognized the man in the front row, third from the left. "Never saw him in my life." "Are you absolutely certain?" "Yes." "Do you stake your professional reputation as a law enforcement officer on it?" "Yes, Sir." Whereupon Campbell rises and identifies himself as Campbell.

Because of the IRS agents' claims of seeing no signs after driving seven times in front of the property - so as to support their claim of a false criminal complaint filed by Jean - I had both the Chamber County Justice of the Peace and the County Attorney testify that there were seven signs on the property, all fronting the road. JP Mays testified that, "You cannot drive down Highway FM 563 without seeing those signs." But for all these dramatics, the jury - appearing numb throughout the trial, as if on drugs, not reacting in the least to obvious courtroom drama - was not satisfied with our defense: that Jean had not acted *corruptly* - "with specific intent to intimidate or impede the IRS agents," but rather had acted with "the good faith belief that her acts were a legitimate exercise of her legal rights and not with the purpose of committing the offense." Under the *similar acts* instruction, the jury was told it could consider Jean's alleged act of assault and battery of the deputy in determining "the state of mind or intent with which the Defendant committed the acts charged in the indictment." If evidence of similar acts was "clear and conclusive" the jury could, but was not obligated to, draw the inference and find that as to the acts charged, Jean "acted knowingly and corruptly and not because of mistake or accident or other innocent reason." Renewal of my motion to dismiss based on Jean's exercise of her right to petition for redress of grievances was denied. Sentencing was next...

However, months later when Jean answered the phone she was surprised. It was a reporter. Jean was acquitted. Judge Gibson *sua sponte* reconsidered my *First Amendment* argument, noting that the government contended that Jean "acted with an obstructionist heart" but that even if the evidence established that she "acted with the sole purpose of obstructing" the IRS investigation, charging Jean with a crime "constitutes an impermissible infringement upon the *First Amendment* right of the defendant to petition the government for redress of grievances." An appeal by the government followed...

Again calling Jean "a leader of an semi-organized tax rebellion," in its brief to the 5th Circuit the government complained that if the decision is upheld it would open "the floodgates for tax protestors to engage in a number of criminal acts directed at agents under the guise of asserting their [sic] own constitutional rights." In response, I wrote:

"Our Government fears anarchy, but it is the right to petition, and only that right, that offers a republican form of government the 'safety valve' needed whenever freeborn men delegate to a few such vast authority to act. For it is the sacred right to petition which guards against frustrations of natural men, which frustrations lead to anarchy and bloodshed. This realization is not without historic precedent, for it was within the Declaration of Independence that Thomas Jefferson declared: 'In every stage of these oppressions We [the people] have petitioned for redress in the most humble of terms: our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free

people.' But the right to petition was not formulated by Jefferson, nor anyone within the Colonies, for it was founded upon the oppressions of the freeborn by a tyrant King in England during the 1600's, in the form of that infamous charge: seditious libel."

I urged that Mrs. Hylton has been charged, in effect, with "seditious libel," a charge abhorred by freeborn Englishmen and abolished by the *First Amendment* right to petition for redress of grievance. "Government concedes that 'We have found no case in which criminal prosecution resulted from a situation similar to the instant case.' If one limits his search to American jurisprudence, the reason is simple. Since the Bill of Rights, the right to petition has been accepted as such a simple, primitive, and natural right *that even a prosecutor of the most perverted genius has not imagined such a vile prosecution as the one against Mrs. Hylton*. And if one researches the full history of the right to petition, one is invariably led to its root: the infamous charge of 'seditious libel.' The charge against Mrs. Hylton cannot stand, as it is illegal under the *First Amendment* right to petition, the common law, the 'law of the land' (Magna Carta 1215) and as Jefferson declared within the Preamble to the Declaration of Independence, the 'Laws of Nature and of Nature's God.' It is against this very risk of anarchy, anarchy which Jefferson so eloquently justified, that the Petition for Redress guards.

"If Mrs. Hylton's conviction is to stand, what man will dare to open his mouth, much less to use his pen, against even the worst governmental administrators. Yea! Even against a President who may be most corrupt and confesseth to it? And if Mrs. Hylton's conviction stands, it then should be denominated *high treason*, for as surely as it is a seditious libel, it is just upon the heels of treason. The charge against Jean C. Hylton, a freeborn sovereign citizen, is a most pernicious attack upon English liberty."

Without oral argument the 5th Circuit upheld Judge Gibson's opinion and concluded "that Jean Hylton's actions represented an exercise of the right to petition for redress of grievances in its pristine form...."

Use Of The "Offshore Triple Trust Tax Shelter"

Next, both the *First* and *Fifth Amendments* served as the linchpin for a major tax case I tried in Seattle: claimed tax avoidance by doctors, lawyers, and other professionals through the *offshore triple trust tax shelter*. Under the program, the clients business net income is paid to the first offshore trust and taken as a business deduction on the domestic return, with the proceeds funneled through a series of offshore trusts and ultimately returned to the client by gift or loan. *A circuitous route*. IRS called the flow of funds "step transactions" and "shams," "to be ignored for tax purposes."

My client *Karl Dahlstrom* and others were charged with conspiracy to defraud the IRS and filing of false tax returns. Karl, a Texas A&M professor, had researched the law and formed The American Law Association which, for its members, provided trust documentation, offshore connections, and legal advice. I represented Karl at trial and filed pre-trial motions to dismiss on *1st Amendment* - free speech and freedom of association and assembly, based on Karl's claimed refuge under the Supreme Court's famous holding in *NAACP v. Button* - and *5th Amendment* due process grounds: lack of notice of any illegality given the novelty of the issues and the fact that both

the 4th and 5th Circuits, in *Critzer* (sale of Indian property) and *Garber* (sale of rare blood), respectively, had held that the *Fifth Amendment* due process clause guarantees citizens the right to be put on adequate notice as the illegality of their conduct. The judge denied my motions, but on appeal after conviction other counsel, making the arguments I made at trial, obtained acquittals in a 2:1 decision, the 9th Circuit finding in its closing sentence that the prosecution was “offensive to the *First* and *Fifth Amendments* to the *U.S. Constitution*.” Karl’s five-year sentence was vacated.

My *Fifth Amendment* right to due process argument set free another client, *Danny Hashimoto*, convicted of tax offenses in a case I tried in Hawaii. Prior to trial I requested, under a new law, §6103(h)(5), tax information concerning the prospective jurors: whether they had “been the subject of any audit or other tax investigation by the [IRS]”, with a response limited “to an affirmative or negative reply to such inquiry.” My motion was denied but, finding the issue “one of first impression,” on appeal by court appointed counsel the 9th Circuit, in a split decision, reversed the convictions. The dissent declared that “Congress has created a trap which operates against the successful prosecution of defendants charged with failing to file their income taxes.” “Congress should address the issue raised by this appeal.” On remand the government failed to timely re-try Danny and he was set free. Congress later changed the law: it repealed the *voir dire* disclosure of prospective jurors’ tax information provision, §6103(h)(5).

I presented a *Fifth Amendment* right against self-incrimination argument in *Kimball*, a criminal failure to file tax return case I tried in Nevada. My client had filed tax returns upon which he claimed the *Fifth*. The 9th Circuit acquitted based on my arguments that a “*Fifth Amendment* tax return” constitutes a return as a matter of law. But the court *en banc*, eleven judges, reversed the three judge panel and upheld the convictions.

Three Clients Set Free By The U.S. Constitution

My *Fifth Amendment* right against self-incrimination arguments prevailed in a case I litigated in Montana. In *Rendahl* my three clients, all non-filers, were faced with an IRS summons enforcement case and because of their non-filing I advised them to assert the *Fifth Amendment* and remain silent as to testimony and production of records. Although they were not under criminal investigation, they stood in a position of “real and accusatory danger.” IRS was investigating William Driscoll, a plumber and the brother of one of my clients, for non-filing. In order to prove Driscoll’s income, IRS wanted the amount of money Driscoll paid my clients as subcontractors.

When I was retained, my clients had already refused IRS’ demand for testimony and records, and the government petitioned the district court to enforce the summons. After granting my request for an *en camera* hearing at which I presented the legal and factual basis for my clients’ legal exercise of their constitutional right to remain silent and not produce records, the court held my clients in contempt but stayed the order pending appeal. (Under the 11th Circuit holding of *In re Lawrence*, my clients could have been imprisoned “indefinitely but not forever.”)

The court deemed “the facts surrounding this case to be illustrative of the wreckage that the type of scheme employed here can do to the present system of tax collection.” The court also noted that “The fifth amendment means what the courts have held it to mean, but the literal language of the fifth amendment - ‘No person ... shall be

compelled in any criminal case to be a witness against himself...’ - is of slight comfort to the defendant here.” I, of course had disagreed, finding for my clients total comfort with their fundamental right against self-incrimination. With a busy trial schedule, I brought on new counsel to handle the appeal. Based on my arguments before the district court the 9th Circuit reversed, which led to the prosecutor’s dismissal of the case. I later tried Driscoll’s criminal case in Missoula and lost, but I won the case for another Montana plumber.

Vietnam Helicopter Pilot

The *Fifth Amendment* also guarantees the right to grand jury indictment, and it logically follows that there can be no *constructive amendment* to the indictment, which is what happened in a case I tried in Alaska. *Jim Paszint* spent eighteen months in Vietnam as a helicopter pilot, returning to Alaska to be a bush pilot and gas station owner. He received a frantic call from his pregnant wife Holly who said there was a strange man at the door, claiming he was from IRS. Having recently heard stories of intruders posing as meter men and otherwise, Jim rushed home with his .44 magnum plus his backup .22 holstered at his ankle. He met an IRS Revenue Officer in the driveway and performed a by-the-book citizen’s arrest, which resulted in a charge of, according to the caption of the indictment, “Assault on a federal officer.” I tried the case, noting that the body of the indictment charged Jim not with assault but with “impeding.” Thus, I requested “impeding” jury instructions and objected to assault instructions. My requests were denied, and Jim was convicted. The 9th Circuit readily accepted my argument of *5th Amendment* right to grand jury indictment - no constructive amendment of the indictment - based on the 1887 case of *Ex Parte Baine*. In fact, the lead panel judge, having just heard - ironically enough - arguments in the *Dahlstrom* case - commented that Jim’s case was “like shooting fish in a barrel.” The conviction was reversed.

The *Sixth Amendment* right to trial by jury prevailed for my client *James Dunkel*, a failure to file tax return case I tried in Illinois. At the time of trial the 7th Circuit was out of step with the 9th Circuit and other circuit courts on the issue of admissibility of evidence of reliance, whether it be what the defendant read or heard. As a general rule any reliance evidence is admissible, not for the truth of the matter asserted but for state of mind. *The defense*. After all, this is how I had won many of my cases: lack of willfulness as a result of good faith belief resulting from good faith reliance. In fact, in one state tax case I tried in Bismarck, North Dakota, I represented five defendants from Fargo, “The Fargo Five,” railroad brakemen. They were all acquitted as a result of reliance on the advice of an attorney from Nebraska who wrote a letter indicating that in his opinion the tax return filing requirement violates the *Fifth Amendment* right against self-incrimination.

Likewise, based on various reliance defenses, I had won numerous other tax acquittals, including: a printer in Phoenix; an Oklahoma pipe fitter; an ironworker in Washington state; a housewife in Texas who relied on her husband; two brothers in Minnesota who were plumbers and relied on a *Fifth Amendment* return advocate and speaker from Arizona; a Montana plumber; and an Iowa pig farmer who utilized the offshore triple trust, relying on a CPA and an attorney who was formerly with IRS. The reliance defense was alive and well in all but the 7th Circuit which had repeatedly held that if the court had determined that the issue upon which the defendant had relied was frivolous, then the defendant could not as much as mention it. *The accused: muzzled before the jury.*

Petition For Certiorari To The Supreme Court Granted

In *Dunkel* I urged before the district court and the 7th Circuit that clearly my client had a *Sixth Amendment* right to a trial by jury, meaning it is for the jury to decide whether or not to believe the defendant's claim of reliance. Of note: for any federal judge to say, as some have, that the *Fifth Amendment* return argument is frivolous is - it logically follows - to say that the three 9th Circuit judges who acquitted in the *Kimball* case acted with frivolity in agreeing with me by their holding that the *Fifth Amendment* return constitutes a return as a matter of law.

Having been denied our petition for redress with the 7th Circuit in *Dunkel*, I petitioned the Supreme Court for a *writ of certiorari*, which was granted. Fortuitously, the now famous *Cheek* case was then pending before our highest Court. I moved to consolidate *Dunkel* with *Cheek*, a motion which was denied, but the Court granted us *cert* and remanded our case back to the 7th Circuit in light of the *Cheek* decision. Cheek was an airline pilot who was convicted of failure to file, evasion, and false claim. The trial court had instructed the jury that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness." Our highest Court avoided the *Sixth Amendment* issue but reversed the convictions based on the willfulness standard under the criminal tax statutes, holding in effect that *the jury is the final arbiter of a silly argument*. In *Dunkel*, the 7th Circuit reluctantly reversed the convictions in light of *Cheek*, blaming me and the prosecutor for its error.

The *Sixth Amendment* also guarantees the right to counsel, and *Doctor Harris* of California retained me after he had represented himself and been convicted of tax offenses. I obtained a reversal with the 9th Circuit for failure of the district court to properly advise the doctor of his right to counsel, a colloquy required by the landmark decision of the Supreme Court in *Farretta*.

Lack Of Sufficient Evidence

In some cases the defense is simply lack of evidence. In another case out of Hawaii, I represented *Eric Lindberg* in his appeal to the 9th Circuit on convictions of conspiracy to evade his mothers's taxes and structuring. The case presented the novel issue: lack of sufficient evidence of knowledge by one defendant concerning the tax matters of another defendant. Under the 9th Circuit decision in *Krasovich*, Eric was entitled to a jury instruction on that point, but one was not requested by defense counsel. Also, counsel did not object to a sentence which included forfeiture, where the issue had not been submitted to the jury, nor did he raise the *Ratzlaf* defense: that a structuring conviction required evidence that the defendant knew it was unlawful to structure. The 9th Circuit acquitted Eric of all charges: for lack of sufficient evidence on conspiracy and structuring, and for failure of the court to submit the forfeiture issue to the jury. Congress later changed the law: it eliminated the knowledge of a crime element pronounced in *Ratzlaf*.

Identical Cases But Opposite Results

After the success in Eric's case, his brother *Tan Lindberg*, who was sentenced to probation, retained me to represent him in a 28 U.S.C. §2255 *habeas* proceeding based on ineffective assistance of counsel (IAC). Tan's case was a carbon copy of Eric's case, but Tan had failed to appeal. For lack of Tan's resources I ghost wrote for Tan and

requested an evidentiary hearing on the issue of IAC, planning to zealously examine Tan's trial counsel on the question of his failure to raise the issues at trial which I successfully raised on appeal for Eric, resulting not in mere reversal but in acquittal. The court granted the request for an evidentiary hearing and I, elated, prepared to fly to Hawaii for the hearing. Next, the district court vacated the hearing, stating that Tan had made the request, which was not true. As pointed out in Tan's motion for reconsideration which I prepared and which was summarily denied, the docket sheet belies the court's conclusion: nowhere does there appear a request by Tan to vacate the hearing. Yet the 9th Circuit affirmed in a three-sentence unpublished opinion. No mention was made of the fact - raised by me through Tan in the district court and by me on appeal - that trial counsel for Tan was the son of another district court judge in Hawaii. *Might makes right.*

A.J. and Anita Lowery, publishers of a tax protestor newsletter, *The Justice Times*, were charged in Arkansas with two counts of failure to file tax returns. I acted as consultant to two CJA attorneys. As to A.J., after deliberating two days the jury returned an obvious compromise verdict: not guilty on the year for which IRS presented evidence of much higher income, and guilty on the low-income year. The sentence was for a fine only. For Anita, the major defense was inability of the government to prove that she had knowledge of a filing requirement. Despite Anita's middle age, IRS was unable to produce a record that Anita had ever filed. For this reason, the court granted judgment of acquittal at close of the government's case in chief.

In the Texas case of *Leanna Schwasinger* my client had already been imprisoned for three years on a thirteen year sentence for tax crimes, and the IAC *habeas* action I filed for her resulted in an evidentiary hearing at which I called as my first witness young and inexperienced trial counsel. It was counsel's first federal criminal trial and he failed to present the good faith reliance defense under *Cheek*; he was plainly ignorant of such. I had Bill Cohan testify as our expert. Soon after the hearing the prosecutor agreed to set Leanna free and the parties so stipulated, the court entering the order. National *habeas* expert Marcia Shein also assisted on the case, was present at the hearing, and made the post-hearing call to the prosecutor.

The Indomitable Alaska Tax Protestor

In another Alaska case - one which defies categorization - I represented the indomitable *Rock Smith*, head of the controversial *Patriots In Action*, a tax protestor "constitutionalist" group. Ironical: Alaska had repealed its income tax laws. But Rock was charged with attempted tax evasion and failure to file returns for years during which the law was effective, and he believed the charges were brought at the request of IRS which had difficulty with their investigation. The state indictment alleged a mere \$483 owed for 1976 and \$2,177 owed for 1977. This was the first criminal tax case in the history of Alaska. *Political prosecution.*

Before I was retained, Rock sued the judge for \$1.3M for violation of Rock's constitutional rights during the arraignment. And Rock also twice moved to disqualify the judge, resulting in a two-day sentence for two counts of contempt. Which led to the prosecutor adding charges of "disorderly and contemptuous behavior toward" the judge.

Rock, a non-lawyer, and I were co-counsel at trial. A major defense: the state could not link any income to Rock. To prove Rock's mailing address so as to provide a link to bank records, the state presented a lady from the

Voter's Registration Office with Rock's application and address. Rock crossed. He asked her if she was absolutely certain that the address she had pertained to Rock - with Rock pointing to me - and she answered, "Yes," resulting in courtroom pandemonium. But Rock's motion to strike the testimony and exhibit was denied. Next, over our vehement objection, the state introduced voluminous Seattle bank records of "Rock Smith," records which bore a signature which appeared the same as that of Rock but was not. What are the chances of two Rock Smiths in Seattle? With identical signatures? The prosecutor had the jurors review the wrong records.

During the weekend break we were able to locate in Seattle the other Rock Smith, whom we called "Seattle Smith," and get him to agree to come to trial and testify. I would look at the jury and call as our first witness "Rock Smith," hesitate, and all of the jurors, the judge, and spectators would look at our client, waiting for him to leave his chair and take the stand. I would then go to the door in the back of the court room, open it, and loudly ask Seattle Smith, "Mr. Rock Smith, please come forward, take the stand, and be sworn." By this method we would bring out the state's lie and hopefully totally destroy their credibility with the jury. But the other Rock foiled our dramatics by contacting the prosecutor early Monday morning, who in turn informed the court *ab initio*, "Your Honor, we have a slight problem," to which the judge, after hearing the explanation, responded, "You sure *do* have a problem." The court ordered a mistrial and ordered the state to pay my attorney fees and Rock's lost wages, a total of \$35,000, as condition of a new trial. The state refused, and the judge dismissed the case. But the dismissal was followed by a federal tax prosecution of Rock and his wife Carol...

Rock proceeded *pro se* and, against my advice raised as his defense his belief that the tax laws are unconstitutional. From experience I well knew that such a defense was not viable; repeatedly the courts expressly instructed juries that such a belief is not a defense. I represented Carol and obtained a hung jury and no re-trial. Rock was convicted and sentenced to prison, serving only eight months.

\$500,000 Cash Stuffed In An Overcoat

Because IRS Special Agents are very thorough in their case review, it is highly uncommon that a criminal tax case is dismissed because it was filed past the running of statute of limitations. After all, generally IRS has six years for tax offenses, and in the case of conspiracy, 18 U.S.C. §371, the statute is only five years but it begins to run from the last overt act in furtherance of the conspiracy. But what if - unknown to IRS and the prosecutor - the defendant withdrew from the conspiracy?

I was appointed to represent a man who was dissatisfied with his present court-appointed counsel who had strongly recommended that the client accept a plea calling for prison time. My client had been a courier for laundering of drug money from a major operation in Tucson headed by an attorney. The charge was a tax and money laundering conspiracy against my client, the attorney, and others. Making two airline trips from Phoenix to London, my client wore - and did not remove during the twelve-hour flight - a large trench coat bearing a half million dollars in cash on each trip. He was not caught with the cash. He deposited the cash into a London bank account, and wired it back to the Tucson attorney who laundered it through a golf course he had purchased. My client's defense: as evidenced by his correspondence to fellow conspirators, he withdrew from the conspiracy such that the indictment

was filed a mere five days beyond the running of the five-year statute of limitations. Chief Judge McNamee ordered the government to produce evidence that the defendant remained a part of the conspiracy within the five-year window. None was produced, and the case was dismissed with prejudice.

Vietnam Medic

While not common, jury nullification is a possible defense, one which won the day for my comrade in arms, Vietnam combat medic client charged with tax crimes in Alaska, *Randy Knowles*. We introduced Randy's military background, which included two Silver Stars for his combat heroism and two Purple Hearts for the wounds he endured. The jury was hopelessly deadlocked 7:5. The judge declared a mistrial and the two prosecutors declined further prosecution, recognizing the decision for what it was: jury nullification. The two Silver Star citations provided to the jury state in part:

"9 June 1968—Republic of Vietnam. For gallantry in action while engaged in military operations involving conflict with an armed hostile force ... contact was made with an enemy force, and his unit sustained four casualties. [Randy] immediately began crawling forward to aid the wounded men who were pinned down by a hail of hostile rounds. With complete disregard for his personal safety, he maneuvered from one individual to another, administering first aid as the insurgents' fire struck all around him. Although he was seriously wounded while helping his fellow soldiers, [Randy] continued to render aid until all were safely evacuated. His extraordinary courage, initiative and determination were instrumental in saving the lives of several of his wounded comrades. [Randy's] unquestionable valor in close combat against numerically superior hostile forces is in keeping with the finest traditions of the military service and reflects great credit upon himself....By direction of the President...."

"1 December 1968—Republic of Vietnam. For gallantry in action while engaged in military operations involving conflict with an armed hostile force....At approximately 0300 hours, the friendly encampment was subjected to intense hostile mortar and rocket-propelled grenade fire, followed by a massive ground assault. As soon as he learned that the battalion tactical operations center had received two direct hits by incoming rocket-propelled grenades, Randy immediately left his bunker and ran through the hail of hostile rounds to treat the wounded. After administering first aid to the three casualties at the bunker, he obtained additional medical supplies and ran to the perimeter. With complete disregard for his personal safety, [Randy] braved the relentless enemy fire as he constantly moved about in the open, treating the wounded and organizing evacuation teams....[Randy] also assisted in carrying five seriously wounded individuals to medical evacuation helicopters. His extraordinary courage and deep concern for the welfare of his fellow soldiers were major factors in saving the lives of many Americans during the encounter. [Randy's] unquestionable valor in close combat against numerically superior hostile forces is in keeping with the finest traditions of the military service and reflects great credit upon himself....By direction of the President...."

IRS had almost succeeded in putting behind bars patriot and combat hero, Specialist Four Medic Randall Knowles, for a tax crime he did not commit. *Almost*.

"Keep Out of Gun Shot"

As Frances Bacon advised, “The best armor is to keep out of gun shot.” The best result for the criminal tax investigation is: cause the prosecution to be declined. In dozens of cases I succeeded in having the criminal tax case dropped, by either the IRS Special Agent or the prosecutor, whether Assistant U.S. Attorney or Department of Justice, Tax Division counsel. In a Phoenix case the client had a construction business and paid out huge amounts of cash to illegal alien workers. IRS Special Agents thought the client was skimming, but when presented with pay-day evidence, dropped the case. Special Agents dropped the case of another Phoenix client, a tax preparer, who innocently relied on misinformation provided by a claimed expert. In Texas, a chiropractor bought into the “mail order ministry” program. After hearing my “good faith reliance on promoter” defense the Special Agent dropped the case. Likewise, an Illinois case was dropped by agents when I presented, through the business owner client, the good faith reliance on Dahlstrom’s “offshore triple trust” program, which (initially) had saved the client millions of dollars.

I succeeded in having a DOJ prosecutor drop the case as a result of my client’s waiver of his *5th Amendment* right to remain silent and his personal explanation as presented by him and me to the prosecutor in D.C.: a diminished capacity defense. The client was too trusting of others. For example, he had “invested” \$300k with a man he met for the first time in a *Denny’s*, only to be defrauded. Having inherited money from his grandmother, he lost \$1M to fraudsters. These facts set up the simple analogy: he was likewise duped by tax protestor jargon upon which he blindly relied in deciding to stop filing tax returns and paying taxes. In another diminished capacity case IRS counsel agreed to not forward the case to DOJ for prosecution after I presented an opinion letter from a clinical psychologist. In yet another “offshore triple trust” case, I, with the help of Bill Cohan, obtained with the AUSA declination of prosecution as to a father and daughter based on the reliance on counsel defense. The father had caused a (legal) surreptitious tape recording of his meeting with two attorneys who advised their clients that the offshore trust program they purchased from a promoter was legal. In fact, one of the attorneys prepared some of the returns targeted by IRS. Not knowing of the tape, when interviewed by IRS the attorneys lied but were never prosecuted.

“IRS: Caught On Tape”

It is impossible to cross examine an audio tape. But, what better than a videotape, one which shows IRS Revenue Officers lying? “*IRS: Caught On Tape*,” was the headline story to an edition of the tabloid TV show, *Hard Copy*. My client *Chris Rowenhurst* and I told his story on the show.

Chris owned a pawn shop in Fullerton, California and owed IRS taxes. Unannounced, two Revenue Officers showed up one day and surprised Chris. Chris said he was unable to pay the liability and lawfully refused their request for further entry and seizure of assets to satisfy the tax debt. After the short interview was terminated by Chris, he said, “Have a nice day,” and the agents left. The next day Chris was arrested without a warrant, much less probable cause, cuffed, and imprisoned, waiting two days for his release hearing. He was charged with both assault on and interfering with the agents. The agents had flat out lied to superiors, claiming that Chris had displayed a handgun in the waistband of his pants, stating, “What do you want me to do, kill?” Claiming that they had to walk

out of the shop backwards, fearing for their lives, the agents had neglected to notice the video cameras in the store. Upon seeing the videotape the prosecutor dismissed the charges.

For their clear lies to superiors, which lies led to false arrest and incarceration, Chris sued the officers in federal court for violation of his constitutional rights. In 1971 the Supreme Court held in *Bivens* that a citizen can sue federal agents for violation of *Fourth Amendment* rights. Similar to Chris, Bivens claimed that agents made a warrantless entry of his apartment, searched, and arrested him on narcotics charges. But for Chris the district court dismissed the complaint for failure of Chris to sufficiently plead that the agents had violated a clearly established constitutional right. I was retained to take the appeal to the 9th Circuit.

While Chris's trial counsel could have done far better in pleading the case, how clearly established is the *Fourth Amendment* right? "The right of the people to be secure in their person, houses [and offices], papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issued, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persona or things to be seized." Aside from the amendment on its face, by a close cousin example, *Bivens* made the rights clearly established. *Crystal clear*. In an unpublished decision the 9th Circuit held that Chris "had ample opportunity to plead a clearly established right violated by defendant's conduct." Our highest Court denied our petition for *certiorari*. And, to add insult to injury, the agents were not charged, despite the fact that *18 U.S.C. §1001* makes it a crime to lie to a federal officer as to any matter within his jurisdiction. The agents clearly lied, and the lies clearly resulted in the arrest and imprisonment of Chris. *Ergo: a §1001 violation*. Yet the district court and 9th Circuit criticized trial counsel for failure to identify a statute violated by the agents.

Disparity In Sentencing

Also in the current headlines: disparity in the sentencing of tax defendants, political and otherwise. But was the conviction by plea or trial? *First in the door gets the best deal*. Those who cooperate, especially those who *flip* - agree to testify against others - often obtain lighter sentences than those who have to "pay rent on the court house" for exercise of their *Sixth Amendment* right to trial. All federal sentences are governed by the *Federal Sentencing Guidelines* which for many years were held by the Supreme Court as mandatory but now are advisory. None the less, typically judges generally adhere to the *Guidelines* but they can now exercise greater discretion. Under both the old and new system, a cooperating witness could - and now still can - get a *sweetheart deal*.

Critical for sentencing in tax cases is the tax loss, for which the *Guidelines* provides a *Tax Loss Table*; e.g., for a tax loss of \$550,000 to \$1.5M for a first time offender, and no adjustments, the offense level is 20 with a sentencing range of 33 to 41 months. But if the client enters into an early plea agreement, the offense level is reduced by three levels, to 17, and a range of 24 to 30 months, for a reduction of 9 to 11 months. In essence, a three year sentence is reduced to a two year sentence. If the sentence is over 12 months, the client is entitled to a 15% reduction for "good time served" and is often placed in a halfway house with work release during the last 3 to 6 months to be served. Thus, even without a *Guidelines* "departure," the two year sentence might result in less than one and a half years of imprisonment. A *Guidelines* offense level can be increased by 2 for sophisticated means,

such as the use of offshore trusts or an elaborate scheme of hiding assets, and by 2 for multiple counts/grouping, as in the case of convictions for both tax evasion and bankruptcy.

Under the new system, a defendant has *two bites at the apple* in obtaining a sentence lower than the *Guidelines* calculation: (1) a “departure” from the sentencing range as calculated from the criteria set forth in the *Guidelines*; (2) a “variance” from the final *Guidelines* range, including any departures, and utilizing the numerous factors found in 18 U.S.C. §3555(a), about which the judge can exercise discretion; e.g., avoiding unwarranted disparity, §3355(a)(6). For cooperating witnesses, it is common for the prosecutor to move for a downward departure. However, in the case of former counsel to President Donald Trump, Michael Cohen, he likely would have obtained a downward departure for his cooperation and assistance to agents and prosecutors except that such was not requested by the prosecutor who claimed that Cohen reneged on the cooperation agreement and did not fully cooperate as promised. As the prosecutor stated in his sentencing memo, “While [Cohen] answered questions about the charged conduct he refused to discuss other uncharged criminal conduct, if any, in which he may have participated.” The truth, *the whole truth*, and nothing but the truth.

Finally, and returning to current public interest: how many of the “Varsity Blues” defendants will go to trial rather than accept the offered plea? But the \$64,000 federal tax prosecution question is: will controversial attorney Michael Avenatti proceed to trial? While - granted - the indictment consists merely of allegations and is not evidence, yet consider the numerous tax and tax related charges: (1) failure to file personal, partnership, and corporate income tax returns; (2) obstructing IRS; (3) submission to a bank of a false tax return which was not filed; and (4) failure to pay employment trust fund taxes. Nonetheless: *No pancake is so thin it does not have two sides*. But as well, we are reminded: *Those who live in glass houses should not throw stones*. A forthcoming Motion to Dismiss for Selective and Discriminatory Prosecution? *No easy row to hoe*.

Donald W. “Mac” MacPherson has been in practice for over 40 years. His former clients include two governors, three state senators, CIA operatives, a Hollywood Star, and a major U.S. airline. Mac is certified by the Arizona State Bar as a specialist in both tax law and criminal law. He has written three tax books and tried 55 criminal tax cases in federal court in 25 states See www.BEAT-IRS.com.