IRWIN SCHIFF, Pro Se
444 E. Sahara
Las Vegas, Nevada 89104
702-385-6920
(Fax) 702-385-6917

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES	)	
	)	
Plaintiff	)	CR-S-04-0119-KJD-LRL
	)	
V	)	DEFENDANT'S REPLY &
	)	OBJECTION TO MAGISTRATE
IRWIN SCHIFF, CYNTHIA NEUN	)	JUDGE LEAVITT'S REPORT &
And LAWRENCE N. COHEN, a/k/a/	)	RECOMMENDATION" (No. 116)
	)	REGARDING SCHIFF'S MOTIONS
	)	TO DISMISS (#42, 54, 64, and 80)
Defendants	)	**ORAL ARGUMENMT DEMANDED**

COMES NOW, Defendant Irwin Schiff and replies and objects to Magistrate Judge Lawrence R. Leavitt's "Report & Recommendation" with respect to Schiff's Motions to Dismiss Numbers 42, 54, 64, and 80, for the following reasons.

I

MAGISTRATE JUDGE LAWRENCE R. LEAVITT HAS ALREADY DEMONSTRATED THAT HIS "REPORTS & RECOMMENDATIONS' CAN NOT BE RELIED UPON AS CORRECTLY REFLECTING THE LAW AND/OR THE LITIGANTS' POSITIONS WITH RESPECT TO IT

1) While Defendant Schiff will address Magistrate Judge Lawrence R. Leavitt's "Report and Recommendations" with respect to Schiff's Motions as referred to above, it is clear from Magistrate Judge Lawrence R. Leavitt's "Reports and Recommendations" (No.'s 85 & 95) and Defendant Schiff's Responses (No.s 107 & 109) to them, that Magistrate Judge Lawrence R. Leavitt does not base his Reports on either: (1) the law as it applies to this case; or (2) on the actual positions argued by the litigants with respect to them. Magistrate Judge Lawrence R. Leavitt is so determined to rule in favor of the government that he will: (1) (a) disregard Schiff's claims regardless how valid they are; (2) disregard the government's claims even when he knows them to be false; and (3) will even seek to buttress the government's position with arguments he fashions for them. While not covering all such examples, two bear repeating, so as

to put Magistrate Judge Lawrence R. Leavitt's third "Report" in a more realistic light before Schiff attempts to address it. For example:

(1) Schiff claimed in Document No. # 85 that the Court had no subject matter jurisdiction with respect to alleged income tax crimes, because no statute made him "liable" for any such tax.. Since it was unable to identify any such statute, the government claimed that Code sections 1, 61, 63, 6012, and 7203 made Schiff "liable" for income taxes. In his Reply, Schiff pointed out why none of these statutes could make Schiff "liable" for income taxes. Despite the government's inability to identify the statute at issue, Magistrate Judge Leavitt, nevertheless, characterized Schiff's argument "frivolous" and "not meriting discussion," and proceeded to support the government's position by citing two cases (*Wilcox v. Commissioner,* 848 F.2d 1007 and *Rowlee v. Commissioner,* 80 T.C. 1111) that the government never cited in support of its position, while he did not comment on the government's claim that sections 1, 61, 63, 6012, and 7203 made Schiff "liable" for income taxes. The point is, Magistrate Judge Leavitt did not rule in favor of the government based upon what the government said on its own behalf, but what he raised on the government's behalf.

2) In addition, Magistrate Judge Leavitt managed to hold that the special agents who conducted the search and seizure at issue were authorized to do so, despite the fact that he placed them in to a statute that: (1) clearly precluded them from having any such authority; and (2) despite his having been made aware that their ***very job description*** precluded them from having any such authority. If Magistrate Judge Leavitt could rule so erroneously in favor of the government on issues that are not even complicated, how can he be expected to discuss and rule objectively on issues that involve even sleight subjective elements?

II
WITH RESPECT TO SCHIFF'S CLAIM THAT THE TAX RETURNS REFERRED TO IN COUNTS 18-23 BE SUPRESSED

Counts 18-23 charge Schiff with filing returns claiming he "earned zero business income"[1] which Schiff "did not believe to be true and correct." However, as Schiff pointed out in his Memorandum of Law, Schiff was compelled to file returns for those years, otherwise he could be (illegally) prosecuted for failing to file income tax returns under 26 U.S.C 7203 as he

[1] He claimed he received "zero" *income* during the years at issue, not that he received zero "business income." He fails to see the distinction between "zero" *income* and "zero" *business income.* He claims that nothing he received in the way of "income" from ***any*** source, business or otherwise, was *taxable* income as referred to in section 61 of the 1954 Internal Revenue Code.

had twice been prosecuted in the past. Since Schiff believed: (1) he received no income for the years at issue in the "constitutional sense," (as referred to in Senate Report 1622 and House Report 1337 (83rd Congress, 2nd Session); and (2) since he believed that no law made him "liable" for income taxes, there was no need for him to file. Therefore, he attached to his "zero" returns a statement that he was filing anyway, so he would not to be (illegally) prosecuted for the alleged crime of not filing, as he had been (illegally) prosecuted in the past pursuant to 26 USC 7203 and 7201. He also pointed out in that statement that consequently those returns "were not being filed voluntarily" but were being filed out of fear that if he did not file he could be illegally prosecuted as he had been twice prosecuted in the past. Therefore all the information on the returns at issue were "compelled" from Schiff just as surely as if it had been extracted from him by placing him on a rack. There is simply ***no way*** that this Court can draw a ***legal distinction*** between these two forms of compulsion.

As pointed out by Schiff, Professor Michael Saltzman correctly identified a 1040 as being a "confession," while Schiff pointed out that "returns" were first identified as documents prepared by tax collectors, not the public.

The government claimed in its Response that "The Supreme Court has long held that the statutory requirement to file tax returns does not violate the Fifth Amendment" and based its claim on *Flint v. Stone Tracy Co.*, 220 U.S. 107, 177(1911). However, as Schiff pointed out, the Supreme Court in *Flint v. Stone Tracy* made no comment as claimed by the government. For one thing, *Flint v. Stone Tracy* involved the constitutionality of the Corporate Excise Tax Act of 1909, and since corporations cannot claim the right not to be a witness against themselves (or the privilege against self – incrimination), this issue could not have been addressed by *Flint* – and it was not. Schiff included in his Reply the entire statement made by the *Flint* Court on this issue, which was:

> We cannot say that this feature of the law does violence to the constitutional protection of the Fourth Amendment, and this is equally true of the Fifth Amendment, protecting persons against compulsory self-incriminating testimony No question under the latter Amendment properly arises in these cases, and when circumstances are presented which invoke the protection of the Amendment and raise questions involving rights thereby secured it will be time enough to decide then.

Therefore the *Flint* Court stated that the Fifth Amendment issue did not "properly arise" in this case, and if "circumstances are presented which invoke the protection of the Amendment…it will be time enough to decide then." Since the *Flint* Court **clearly** did not state ***in any way*** what the government

claimed, Schiff requested that Rule 11 sanctions be imposed on the government for making such a blatantly false claim. ***Yet in his Report Magistrate Judge Leavitt repeats the same false claim!*** He states: "Binding precedent has clearly held that the disclosure of financial information on a tax return does not violate one's Fifth Amendment right against self-incrimination. See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 177 (1911); *United States v. Neff*, 615 F.2d 1235, 1238-41 (9th Cir. 1980.)." The Supreme Court case of *Flint* and the 9th Circuit case of *Neff* hardly provide "binding precedent" that "the disclosure of financial information on a return does not violate one's Fifth Amendment right against self-incrimination."

Defendant has attached as Exhibit A pages 28 & 29 of the "United States Attorney's Bulletin" of April 1998. Notice this segment of the "Bulletin" is captioned "Follow that Lead! Obtaining and Using Tax Information in a Non-Tax Case." The article goes on to explain how federal prosecutors can use tax return information to prosecute filers in all manner of non-tax cases.[2]

The article points out, among other things

> "In even the most straight forward fraud case, the usefulness of tax returns should be apparent….tax return information provides a statement under ***penalty of perjury*** which may either serve as ***circumstantial evidence*** of the target's ***misrepresentations of his economic status*** or as helpful cross-examination material…..***the filed returns are direct evidence of the fraud***…Tax disclosure ***may uncover*** interest income or concealed bank accounts or depreciation schedules for concealed or transferred equipment or rental property…Disclosure of tax returns may also provide ***critical leads and impeachment material*** in a political corruption investigation…A tax return showing below market interest on claimed 'loans' to a public official may support the inference and ***corroborate the proof*** that the 'loans' were extorted under color of official right in ***violation of 18 U.S.C. § 1951(b)(2)***.

Any lawyer or federal judge who would maintain that a law that compelled individuals to supply information to the government that could be used against them in the manner described above did not violate their protection under the Fifth Amendment, obviously would have slept through most of "Constitutional Law 101."

The 9th Circuit in reversing the conviction of Roy D. Garner (*Garner v. U.S.*, 501 F. 2d. 228, (1972)) who was convicted on gambling charges based on information he disclosed on his tax return stated:

[2] It goes without saying that return information can be used against taxpayers to convict them of tax evasion

> We cannot sanction waivers of constitutional rights "without the deliberate examination of the circumstances surrounding them …." *Marchetti supra,* 390 U.S. at 51, 88 S.Ct. at 704. This record contains no fact tending to establish that appellant was aware of his right to object and thus the conclusion is impermissible that his declarations were "**voluntarily** entered upon a public record." *Stillman, supra.* The admission of the returns was thus error and, obviously, the information in them highly prejudicial. (Emphasis added)

Since the court concluded that it was "impermissible" to conclude that his "declarations" on his income tax return were "voluntarily" given, it was error for the trial court to have allowed the returns to be used against Garner. Since on all of the returns at issue, Schiff specifically declared that the information they contained was not "voluntarily given" but given solely to prevent his prosecution under 26 U.S.C. 7201 and 7203, they can not be used against him – applying this very same principle. How could this basic principle of constitutional law apply to Garner, but not to Schiff?

In a subsequent rehearing en banc, the 9th Circuit reversed itself and now affirmed Garner's conviction and the use of his tax return against him because the 9th Circuit now pointed out:

> Garner stated in his tax returns that he derived income from gambling and wagering. At that time, he was not a defendant but a witness. The privilege, therefore, must be asserted at some time. The simple question is whether he should have claimed his privilege at the time he filed his return or whether he could wait until his subsequent conspiracy trial.

The 9th Circuit held that Garner's returns could be used against him because, "Garner provided the source of his income on his return and failed to invoke his privilege." The court explained, that if Garner "failed to assert his privilege at a civil trial and proceeded to testify, his answers could be used against him. His failure to invoke his privilege in his tax return produces a similar result." In other words, Garner provided the information on his tax returns without objection, and without indicating that he was ***not*** providing the information "voluntarily," – as defendant did in the returns at issue.

However, in a *scathing* dissent, five judges disagreed with the seven judge majority and characterized their decision as "***completely untenable***, both in theory and under the Supreme Court decisions which bind the determination in this case" (emphasis added), and proceeded to explain why the majority decision was erroneous on a variety of grounds. The minority dissent contains such observations as:

> The protection against self-incrimination afforded by the constitutional privilege extends to the exclusion of prior answers when they are ***involuntarily given***." (citing

> omitted). …The privilege does more than provide a defense to one who sticks to his guns and is prosecuted for his silence rather than succumbing to the governmental compulsion….in Marcheitti v. United States [the Supreme Court 1968], has indicated the privilege is available to exclude **incriminating answers on tax returns at trial** even though the defendant failed to invoke his privilege on the return…

As pointed out in Schiff's Reply, the Supreme Court affirmed Garner's conviction primarily because Garner allegedly supplied the incriminating information without registering any objection on his return:. The Supreme Court pointed out:

> The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a "witness" as that term is used herein. Since Garner disclosed information on his returns instead of objecting, his Fifth Amendment claim would be defeated by an application of the general requirement that witnesses must claim the privilege.

And as Schiff further pointed out in his Reply:

> After analyzing some choices that apparently were available to Garner, the Court `also stated, "For the reasons stated below, we conclude that *no such factor* deprived Garner of *that free choice*." In other words, the court concluded that Garner made a "free choice" to provide the information contained on the tax returns that were being used against him, and so he could not claim Fifth Amendment protection with respect to those returns being used against him in a criminal trial. One of the choices that the Court said was available to Garner was to claim 5th Amendment protection, and he would get an evidentiary hearing on his claim, as provided by *U.S. v. Sullivan*, supra, to see if he "validly" pleaded the 5th. Well, that's what Schiff did with respect to his 1974 and 1975 returns in which he pleaded the 5th and specifically referenced the *Sullivan* decision. However he never got the evidentiary hearing as promised in *Sullivan* and as referred to in *Garner*, nor did he ever hear of anybody who did. Therefore, Schiff was not going to risk that "option" again. Therefore the "objection" that Schiff elected to use, was to indicate on those return/confessions that he was not filing them "voluntarily" …And clearly based on the Supreme Court holdings in *Miranda v. Arizona, supra; Wan v. United States*, supra; and *Garner v. United States*, supra (as referenced above), to say nothing of the 5th Amendment itself, such returns/confessions can not be used against him in a criminal trial. (Emphasis added)

Obviously, **based on the principles stated above**, it makes no difference whether the compelled information is used to convict someone of alleged violations of tax law or alleged violations of some other law. **The Fifth Amendment does not make any such distinctions and neither does Rule 11(c)(3)** – and in none of the court decisions cited by either Schiff or the government were the provisions of Rule 11(c)(3) raised or considered. This Rule specifically grants defendants "the right against compelled self-incrimination" which using the information on Defendant's own, compelled tax returns **compels** him to do. Therefore in this situation it makes no difference what federal court judges say about the matter. The primary rule of

statutory construction is what does the law say, not what judges say the law says. "When the words of a statute are clear, the statute means what it says" is a legal principle known to all federal judges. And the words of Rule 11(c)(3) are **crystal clear** and do not have to be "interpreted." It *specifically* provides defendants in criminal trials "the right against compelled self-incrimination." Schiff was "compelled" to file the returns at issue as he stated on his returns. If he did not fear criminal prosecution for failing to file ***he would not have filed any returns at all,*** and so the government would not have received the statements it now claims are "false and fraudulent." . Therefore, the government wants to use against Schiff, the very returns and information it compelled him to provide the government. This is a clear violation of Rule 11(c)(3) as well as the 5th Amendment, and anyone who can't see that should be declared legally blind. And federal courts cannot – legally - change the clear meaning of the 5th Amendment and the clear meaning of Rule 11(c)(3) simply to accommodate the government's lawless enforcement of the income tax.

As the former Chief Justice John Marshall stated in ***Osborn et al v. The Bank of U.S., 6 L.Ed 204***

> Judicial power, as contradistinguished from the power of the laws has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised *in discerning the course prescribed by law*; and, when that is discerned, *it is the duty of the court to follow it.* Judicial power is never exercised for the purpose of giving the effect to the will of the judge, always for the purpose of giving effect *to the will of the legislature;* or, in other words, the ***will of the law.*** (emphasis added)[3]

And the "will of the law" as contained in the 5th Amendment and in Rule 11(c)(3), as confirmed by the legal principles stated above and in the Supreme Court cases of *Miranda v. Arizona* 384U.S. 436; *Wan v. United States*, 266 U.S. 1, 14-15; and *Bram v. United States*, 168 U.S. 532 as quoted and cited in Defendant's Reply brief – clearly protects Schiff from having used against him the returns and information the government compelled him to supply on the tax returns at issue – as Schiff specifically noted on the very returns at issue.

Defendant Schiff specifically claims the protection of the 5th Amendment and Rule 11(c)(3), and if this Court were to disregard the protection afforded him by these constitutional

[3] In addition, Article 1, Section 1 of the United States Constitution provides that "***All*** legislative Powers shall be vested in Congress," Thus the expression "case law" implying that judges can make law, independent of Congress to which the public must conform certainly finds no support in the Constitution, as John Marshall obviously understood.

and statutory provisions, it would mean that this court, in league with Magistrate Judge Lawrence R. Leavitt and the DOJ attorneys representing the government, are all jointly in violation of 18 U.S.C. 241.

III

THE "REPORT" ERRED BY FINDING THAT COUNT ONE OF THE INDICTMENT PROPERLY CHARGES AN OFFENSE.

28 U.S.C. Section 371 provides for two forms of conspiracies depending on which clause in the statute is charged. These two clauses seem to overlap, however, when a fraud on the United States also violates a specific federal statute. United States v. Helmsley, 941 F.2d 71, 90 (2d Cir. 1991), cert. denied, 112 S. Ct. 1162 (1992). This is the precise situation in the instant matter. There are no offenses not specifically defined by Congress for any violation of the tax laws.

The Supreme Court held in Spies v. United States, 317 U.S. 492, 497, 63 S.Ct. 364, 87 L.Ed. 418 (1943), that the **penal provisions** of the Internal Revenue Code **comprehensively** cover **every duty under the income tax law** and **provide a penalty suitable to every degree of delinquency**.

The Magistrate found that United States properly charged Schiff with the defraud clause of Section 371 by limiting or misinterpreting the Sixth Circuit's decision in United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989). The Minarik Court squarely held that in order to properly alert defendants of the charges against them, prosecutors must use the offense clause, rather than the defraud clause, when the conduct charged constitutes a conspiracy to violate a specific statute. Id., 875 F.2d at 1187.

In Minarik, defendant Aline Campbell had been issued three tax assessments totaling $108,788.15. Campbell told the IRS she did not owe the money. Campbell then solicited the aid of her friend, defendant Robert Minarik, to help her sell her home and conceal the sales proceeds. The home was sold, with the buyer issuing seven checks to Campbell in the amount of $4,900 each and one check in the amount of $3,732.18. Campbell and Minarik began cashing the checks at various branches of the same bank. When Campbell cashed two checks at the same branch, the IRS was contacted. The defendants were charged with conspiracy to "defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury." 875 F.2d at 1187-88.

The Sixth Circuit found that the defendant's conduct could have been properly charged under 26 U.S.C. § 7206(4), which makes it a felony to conceal any goods or commodities on which a tax or levy has been imposed. The court then held that "the offense and defraud clause as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 26 U.S.C. § 7206(4)." 875 F.2d at 1187.

The Sixth Circuit articulated three rationales for its decision. First, the court stated that the purpose of the defraud section "was to reach conduct not covered elsewhere in the criminal code" and thus should not be used when a specific provision covers that conduct. 875 F.2d at 1194. Second, section 371's misdemeanor clause, which limits punishment of conspiracies whose object is defined as a misdemeanor, would be defeated if those crimes could be prosecuted as felonies under the defraud clause. 875 F.2d at 1194. Finally, the court found that the prosecution created impermissible confusion as to the notice of the charge to the defendants by incorrectly charging a conspiracy to violate 26 U.S.C. § 7206(4) as a conspiracy to defraud, where it failed to allege the essential nature of the scheme and then changed its theory of the case at trial. 875 F.2d at 1195.

According to the Magistrate, notwithstanding the express holding by the Sixth Circuit, Minarik should be limited to its facts, which would mean that it is applicable only if the following conditions exist: (1) the government charged a conspiracy under the defraud clause when the facts show that the alleged conduct violated a single separate federal criminal offense; (2) the government failed to charge the essential nature of the scheme or the details of how the United States was impeded and impaired; and, (3) the government constantly changed its prosecution theory and failed to adequately inform the defendant of the charges.

Such reasoning is flawed. There is no mistake that Minarik held that United States must use the offense clause, rather than the defraud clause, when the conduct charged constitutes a conspiracy to violate a specific statute.

Accordingly, the Magistrate’s findings must be rejected and Count I of the Indictment dismissed, on these and other grounds.

IV
WITH RESPECT TO SCHIFF’S CLAIM THAT ALL OF THE CHARGES AGAINST HIM MUST BE DISMISSED DUE TO HIS RELIANCE ON SUPREME COURT DECISIONS AND OTHER GOVERNMENT CLAIMS (#64)

As pointed out in Schiff's Memorandum of Law in support his above Motion, the Supreme Court held in *United States v. Bishop,* 412 U.S. 346, 361 (1973) "It is not the purpose of the law to **penalize frank difference of opinion** ... . The requirement of an offense committed 'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court... ," It is Schiff's claim that he has supplied this court with numerous Supreme Court decisions that he has relied upon, and in ***none*** of the government's numerous responses did it ever challenge – let alone refute - any of the basis upon which Schiff relied and interpreted those decisions.

In his "Report and Recommendation" Magistrate Judge Leavitt states "The court finds that Schiff's motion to dismiss the indictment based on his 'good faith' defense is improper. Determination of a defendant's willfulness is a factual question for a jury to determine after examining the evidence presented at trial…The motion must therefore be denied." As he has consistently done with every issue raised by Schiff, Magistrate Judge Leavitt simply misrepresents the nature and character of this issue, so he can more easily oppose it. Naturally, a trial involving income taxes is based on the issue of "willfulness" involving numerous factual issues that go to the issue of "willfulness" which a jury is empanelled to evaluate and consider. However, this specific issue as raised in *Bishop*, actually involves more of a legal question than a factual one – and Schiff has alleged that this *Bishop* doctrine requires the dismissal of all charges against Schiff "*as a matter of law.*"

In his numerous pre trial pleadings, Schiff has discussed at great length his reliance on the following Supreme Court decisions in support his belief that: (1) the 16th Amendment did not "amend" the Constitution nor give Congress any new taxing power; (2) the constitutional character of the income tax was held to be that of an excise tax; (3) the income tax is not enforced pursuant to any of the taxing clauses of the Constitution; and (4) a tax on income from real and personal property is still subject to the rule of apportionment, not withstanding the 16th Amendment. Therefore, Schiff concluded that since Congress realized that it could not realistically collect income taxes in accordance with these principles, it changed the provisions of the 1954 Code so the law would not make the payment of income tax mandatory, so that the actual laws themselves would not be unconstitutional. The Supreme Court decisions that Schiff primarily relied upon in reaching these conclusions were: (1) *Pollock v. Farmers Loan & Trust*, 157 U.S. 429 (1894); (2) *Brushaber v. Union Pacific Railroad Co.,* 240 U.S. 1 (1916); (3)

Stanton v. Baltic Mining, 240 US 103 (1915); and (4) *Eisner v. Macomber* 252 US 189 (1920); all of which Schiff quoted at great length in his numerous pre trial pleadings.

In forming his belief that neither he (nor anyone else) had "income" that was taxable under our revenue laws, Schiff relied on the following Supreme Court decisions which he believed clearly held that "income," as used in the 16th Amendment, (and in 26 U.S.C 61) was the equivalent of corporate profit. Those cases were: (1) *Pollock v. Farmers Loan & Trust,* 157 U.S. 429 (1894); (2) *Brushaber v. Union Pacific Railroad Co.,* 240 U.S. 1 (1916); (3) *Flint v. Stone Tracy Company*, 220 U.S. 107. 151 (1910); (4) *Merchant's Loan & Trust Co v. Smietanka,* 255 U.S. 509; (5) *Stratton's Independence v. Howbert,* 231 U.S. 399; (6) *Southern Pacific v. Lowe*, 247 U.S. 330 (1918); (7) *Bowers v. Kerbaugh-Empire Co.,* 271 U.S. 170 (1926); (8) *Burnet v. Harmel,* 287 U.S.103 (1932); and (9) *Doyle v. Mitchell Bros.,* 247 U.S. 179 (1918). Therefore, the issue as laid down in *Bishop* involves Schiff's claim that he relied – in good faith - on no less than 11 Supreme Court decisions. If this is true, then pursuant to the *Bishop* doctrine, Schiff **cannot** be convicted of any of the charges contained in the indictment, ***as a matter of law***. And who is more competent to determine this issue? - the Court or the jury? While Schiff agrees that the ultimate decision on this question – if this case goes to trial - rests with the jury; however, the Court is competent enough to decide this issue *pre trial*, in order to save both the government and Schiff *the expense of a trial*. How difficult is it for the court to determine whether or not Schiff relied on these 11 Supreme Court decisions in good faith? If this case goes to trial - the Government understands that Schiff intends to make his reliance on these 11 Supreme Court decisions an important issue in his defense. Therefore, the Government is duty bound to argue to the jury, during its case in chief, why Schiff could not have relied on these Supreme Court decisions in good faith. Schiff, on the other hand, will have to explain to the jury – if he is compelled to put on a defense - how he relied on these Supreme Court decisions in "good faith."

However, there is certainly case precedent to allow the Court to decide on this question on its own, and dismiss all of the charges against Schiff without he and the government having to argue to the jury whether or not Schiff relied on complicated Supreme Court decisions in "good faith." [4] As Schiff pointed out in his initial Memorandum:

> A district court may make "preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate finder of fact." United States v. Levin, 973 F.2d

[4] Is any jury *really* going to understand the *Brushaber* decision and its claim that "The whole purpose of the (Sixteenth) Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived."?

> 463, 467 (6th Cir. 1992); see also United States v. Craft, 105 F.3d 1123 (6th Cir. 1997) (Rule 12(b) permits pretrial consideration of any defense that is "capable of determination without trial of the general issue." Id. at 1126)); United States v. Jones, 542 F.2d 661, 664-65 (6th Cir. 1976) (Rule 12 and accompanying notes support decision to dismiss indictment on motion raising legal questions).

In addition to his relying on the above 11 Supreme Court decisions, Schiff also relied upon (for confirmation that his understanding of the legal meaning of "income" was indeed correct) House Report 1337 and Senate Report No. 1622 (83rd Congress, 2nd Session) wherein Congress decreed in both reports that, "The definition (of income as contained in Section 61 of Title 26) is based upon the 16th Amendment, and the word 'income' is used in its constitutional sense." Schiff believes that "income" in its "constitutional sense" cannot mean the same thing as income "*used"* in its "ordinary sense" – but, in fact, means "income separated from its source," as in a corporate profit as was specifically held by the Supreme Court in *Merchant's Loan & Trust Co v. Smietanka*, supra, wherein the Court stated:

> The word (income) must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act (of 1909) and that what that meaning is has now become definitely settled by decisions of this court."

This court can obviously make an informed judgment as to whether or not Schiff relied on this decision in good faith, and if Schiff did, then all of the charges against him must be dismissed **as a matter of law.** If this court claims that it cannot make a judgment as to whether or not Schiff relied on *Merchant's Loan & Trust Co v. Smietanka,* supra, in "good faith," then how can this Court decide *any* question of law that is the least bit complicated? This is obviously an issue that is within the competency and *duty* of the Court to decide, without throwing the burden of deciding this question on a jury, whose understanding of the legal issues involved in these Supreme Court decisions cannot be relied upon. At the very least, Schiff demands oral argument on this issue, since: (1) he wants to know on what basis the government claims that he did not rely on these decisions in good faith; and (2) he wants to be able to instantly challenge the government's claim that he did not rely on these Supreme Court decisions in "good" faith. Again, Schiff wants to point out, that if he relied on these 11 Supreme Court decisions in "good faith," then, based on the *Bishop* decision, he cannot be convicted of any of the charges at issue *as a matter of law*. Therefore, at the very least, this issue cannot be resolved pre trial, without oral argument.

In addition, Defendant would respectfully point out to the Court, that this one question for the court to decide, is far less complicated than what a jury in this case will be called upon to decide in connection with a 33 count indictment. If the Court claims that this issue is too complicated for the court to decide pre trial, how is the jury to decide the question ***in addition*** to all of the ***other*** issues it must decide in a 33 count indictment involving conspiracy charges against three people?

While plaintiff's Memorandum also establishes why the indictment should be dismissed because Defendant Schiff relied on numerous, official government documents including: (1) the Disclosure Statement in a 1040 booklet that noticed Schiff that he had to file and pay federal taxes **only** for such taxes as he was made "liable"; (2) numerous federal documents that informed Schiff that the payment of federal income taxes was based on compliance that was "voluntary"; and (3) a Congressional Research Service report that confirmed that the Supreme Court in *Brushaber* held that the income tax could only be constitutionally imposed as an excise tax. Schiff is not going to raise this aspect of his claim, since he believes that the *Bishop* doctrine is alone sufficient to get the all of the counts against him dismissed.

V

WITH RESPECT TO SCHIFFS CLAIM THAT THE INDICTMENT MUST BE DISMISSED BECAUSE IT WAS BASED ON THE FALSE & UNAUTHORIZED CLAIMS OF SPECIAL AGENT DAVID W. HOLLAND (#80)

In his "Report & Recommendation," Magistrate Judge Lawrence R. Leavitt states, "This Court has, on more than one occasion, addressed and rejected nearly all of the arguments asserted by Schiff in his Motion (# 80)." That statement is false. It would have been more accurate for Magistrate Judge Leavitt to have stated, " This court has on more than one occasion totally ignored all of the arguments raised by Schiff, so to be consistent it will do so again in this Report."

The arguments that Magistrate Judge Leavitt previously ignored with respect to Special Agent Holland, apply here and prove that Special Agent David W. Holland had no authority to: (1) apply for, and execute the search warrant at issue; (2) execute the affidavit that supported the search warrant; (3) testify before the grand jury on matters involving the income tax affairs of Defendant Schiff; (4) gather evidence and screen grand jury witnesses; (5) and do *anything* at all

in connection with the income tax affairs and alleged liabilities of this Defendant, as Schiff argued in his original Memorandum of Law and in his Reply brief.

A. With Respect to Mr. Holland's Lack of Authority To Be Involved *In Any Way* With the Income Tax Affairs of Defendant Schiff.

(1) Mr. Holland was precluded by his job description *alone* from getting involved in the income tax affairs of Defendant Schiff.

Defendant Schiff stated in his Reply brief that he was:

> Supplying the Court with Mr. Holland's :
>
> > Job description as contained in the IRS' "Organizing and Staffing Manual" which was attached to Defendant's Motion as Exhibit A, and as stated by Schiff in his Motion to dismiss [It showed that]:
> >
> > Special Agents such as Mr. Holland are only authorized to enforce "the criminal statutes applicable to income, estate, gift, employment, and excise taxes…involving *United States citizens residing in foreign countries* and nonresident aliens subject to Federal income tax filing requirements…" Since Defendant is a not a "United States citizen residing in a foreign country," nor a "non-resident alien," David Holland had no legal authority to conduct the extensive examination of Defendant's affairs as revealed in his affidavit.
> >
> > Since Defendant's claim regarding the lack of authority of Sam Holland in the income tax affairs of Schiff has been ***admitted*** by the government (as explained above), Defendant Schiff should not have to proceed ***beyond this point*** to get the indictment dismissed, since it was all largely based on the unlawful and unauthorized activity of Mr. Holland, with the knowledge and culpability of the government prosecutors.

Neither the government in its Response, nor Magistrate Judge Leavitt in his "Report" sought to even **mention** the obvious limitations placed on Mr. Holland's authority as imposed by his official job description, let alone attempt to refute Schiff's claim that *it alone* proved that Special Agent Holland had no legal authority to be involved ***in any way*** in Schiff's prosecution. Yet Magistrate Judge Leavitt refused **to even comment upon** this element of Schiff's defense. This fact **alone** should be enough get the indictment dismissed, if this Court is really interested in truth and law as it applies to this prosecution.

(2) In addition, Code section 7608(a) barred Special Agent Holland from getting involved in the income tax affairs of Defendant Schiff.

Magistrate Judge Leavitt refused to comment on (since he agreed that whatever authority Special Agent Holland had, was derived from § 7608(a) of the IR Code) the fact that § 7608(a)

only provides for the "**(a) Enforcement of subtitle E and other laws pertaining to liquor, tobacco and firearms."** Therefore, how could Magistrate Judge Leavitt claim that Special Agent Holland was authorized to investigate Schiff for alleged income tax violations when the very statute that Magistrate Judge Leavitt placed him in, could only provide him with the authority (provided he was given additional authority, as shown below) to enforce "**Subtitle E and other laws pertaining to liquor, tobacco and firearms"?**

(3) In addition Schiff, pointed out that § 7608(a) further provides that only agents "whom the Secretary charges" with such duties could derive any enforcement authority from § 7608(a).

Defendant provided the Court with Treasury Regulation **27 CFR 70.33** which specifically provides 7608(a) enforcement authority to BATF agents, and challenged the government to produce a similar Treasury Regulation in connection with special agents – but the government failed to do so. In addition, Schiff provided this Court with excerpts from the Index of the Code of Federal Regulations that showed that the enforcement regulations for this statute were only contained in CFR 27 and not in CFR 26 - further proving, as Schiff alleged, that § 7608(a) had nothing to do with income taxes. Magistrate Judge Leavitt **also ignored** both of these factors in his "Report and Recommendation."

(4) Special Agent Holland Had No Authority to Apply for the Search Warrant at issue, to Make such Representation as Contained in Its Supporting Affidavit, and to Testify to the Grand Jury Regarding the Income Tax Activities of Defendant Schiff.

Apart from Special Agent Holland being precluded from doing all of the above as provided in paragraphs 1-3, in order to apply for a search warrant, Rule 41(a) of the Fed. R. of Crim P. provides that search warrants can only be issued: : (a) " upon the request of a law enforcement officer" and Rule 41(h) requires that they be "within any category of officers authorized by the Attorney General to request the issuance of a search warrant.." Schiff provided this court with two government documents which clearly stated that special agents of the IRS are not "law enforcement officers," and Treasury Reg. 60.2 which clearly showed that IRS special agents were not included on that list. Both of these factors were ignored by Magistrate Judge Leavitt in claiming that Schiff's claims were "redundant and without merit."

B. With Respect to False Statements Contained in Mr. Holland's Affidavit, Which He Undoubtedly Repeated Before the Grand Jury, Which is Why They Appeared In the Indictment.

Defendant Schiff's original Memorandum identified numerous false claims made by Mr. Holland in his Affidavit, and Schiff's Reply explained how these false claims were further misrepresented by the government in its Brief in Opposition. These issues were also ignored by Magistrate Judge Leavitt in his "Report and Recommendation" in the same manner as he ignored the documents (and the implication of his placing special agents in § 7608(a)) furnished to the Court as contained in paragraphs 1- 4 above. Without going into detail concerning how these relevant issues were ignored in Magistrate Judge Leavitt's Report, defendant Schiff would merely point out what these ignored arguments and issues were.

1) Holland claimed that the two page attachment Schiff included with his "zero" returns "contains many inaccuracies and misstatements of law." In support of Holland's claim, the government claimed that the attachment's claim that, "no section of the Internal Revenue Code establishes an income tax liability" was false. However, since the government was unable to identify any Code section that made anyone "liable" for income taxes, how could it claim the statement to be false? As Schiff pointed out in his Reply:

> The government goes on to make a long winded claim concerning how its consolidated response showed how the IR Code "imposes a legal obligation to file federal income tax returns and pay federal taxes." However, if Schiff were wrong on this issue, why didn't the government **prove him wrong** by simply citing a section of the Code that makes persons "liable" for income taxes? There are, of course, numerous such sections in the Code with respect to other federal taxes, and Schiff's two page attachment cites at least three of them: Sections 4401, 5005, and 5703 which relate to federal wagering, alcohol and tobacco taxes. The government's failure to cite any such section, (while fabricating a reason why it failed to do so) *proves* that Schiff is right and the government is wrong.

(2) Next the government claimed that Holland's statement that Schiff's two-page attachment, which tells the public that the 1040 booklet informs taxpayers that they are not required to file "is not accurate. " However Schiff's Reply pointed out that the statement was, indeed accurate. Schiff pointed out that:

> The Notice states "sections 6001, 6011 and 6012(a) …say that you must file a return or statement with us for any tax you are *liable for*." Therefore, if you can't find a Code section that makes you "liable" for income taxes (and obviously there isn't any, otherwise the government would have cited it, which it didn't do) then obviously, the Privacy Act Notice *does* tell you that you don't have to file and pay income taxes.

3) Next the Government attempts to justify Holland's claim that the statement in Defendant's two page attachment that "Congress did not intend for the wages of private citizens to fall within the meaning of income..is utter nonsense." As stated in Defendant's Reply:

> To support its erroneous claim, the government fraudulently states that section 61 "gives a non-exhaustive list of items that are included in gross income" (Defendant has already proved, in his Reply to the government's "consolidated response," why any such a claim is false.) The government continues with its fabricated claim by saying: "The list includes compensation for services and gross income derived from business. Wages certainly fall into the category of compensation for services." However the government fails to explain why, if Congress intended to tax "wages" and salaries" in the 1954 Code, why were these items, which were specifically *mentioned* in Section 22 of the 1939 Code *not mentioned* in section 61 of the 1954 Code? And since "compensation for *personal services*" was specifically mentioned as constituting income in the 1939 Code, why does the 1954 Code only say "compensation for service" and why were the words "*personal service*" specifically removed from the 1954 Code, as it appeared in the 1939 Code? And what *impact* and *consideration* does the Justice Department give to those House and Senate Reports, (that specifically state that the word "income," as used in section 61 of the 1954 Code, means "income in the 'constitutional sense'" and not "income" in the "ordinary sense"), when it brings criminal and civil actions against the American public? ***OBVIOUSLY, THOSE REPORTS ARE TOTALLY DISREGARDED BY THE JUSTICE DEPARTMENT IN ALL SUCH ACTIONS.***

4) In attempting to justify Holland's claim that the "The Federal Mafia" contains false and fraudulent instructions on how to file exempt Forms W-4, the government misquotes and takes out of context the wording of both the law ("Section 3402(n)) and the comments in "The Federal Mafia" concerning it. In explaining why Mr. Holland's statements were fraudulent Schiff wrote in his initial Memorandum of law" the following:

> Exhibit 23 of those hand-outs reproduces page 155 of Defendant's book, ***The Federal Mafia*** in which Schiff reproduces the entire statute 3402(n), which is the statute providing for the "exempt" claim, as well as the W-4 then in use. That statute clearly provides that if an employee furnishes his employer with "a withholding exemption certificate….certifying that the employee (1) incurred no liability for income tax imposed under subtitle A for the preceding taxable year , and (2) anticipates that he will incur no liability for income tax imposed under subtitle A for the his current taxable year" his employer "shall not be required to deduct and withhold any tax under this chapter." Since there is no statute that makes anyone "liable" for income taxes (as shown in Exhibit 6 of the "hand-outs," and as proven by the Government's inability to produce any such a statute, in response to Defendant's motion to dismiss on that ground), *all employees have a right to claim exempt on that basis*. And by explaining this to the public, Defendant was not giving persons "instructions on how to file a ***false*** exempt Form W-4…and to fraudulently stop…withholding," as claimed by Mr. Holland in his affidavit, and as alleged in paragraph 11 of the indictment. Therefore, such a claim constitutes open and shut perjury as contained in Mr. Holland's affidavit, and perjury if a similar claim was made by him to the grand jury.

In attempting to justify Holland's false characterization of the book's treatment on the W-4 issue, the government seeks to defend Holland's claim by stating, among other things, that "Defendant Schiff is blatantly advising his readers to file exempt Forms W-4 with their employers regardless of their true tax liabilities." This statement is totally false as both Mr

Holland and the government's lawyers well know. Both in his book and at his seminars, Schiff makes clear that since: (1) section 3402(n) advises the public that they can claim "exempt" if they believe they have no income tax "liability," and (2) since no statute makes anyone "liable" for income taxes; the public can claim "exempt" on that basis. Therefore, Holland's claim as stated in his affidavit and before the grand jury, that Schiff falsely and fraudulently advises the public that person's can claim exempt "regardless of their true tax liabilities" is a totally false and fraudulent claim – as was more fully set forth in Schiff's Reply.

(5) In order to justify Mr. Holland's false statement that in ***The Great Income Tax Hoax*** Schiff "instructs readers to seek the arrest IRS employees who engage in lawful assessment and collection activities." the government in its Response proceeded to make one false claim after another. As stated in Schiff's Reply:

> In order to prove its point it provided the Court with page 246 of that book (as Attachment A) and claims that:
>
> "On page 246, after discussing a situation where the IRS was engaging in collection activity, defendant Schiff writes "the IRS agents involved could and should have been arrested on the spot." (See attachment A)

However, in his Reply Schiff provided the Court with pages 244, 245, 247, 248 and 249, as Exhibit A, so the Court could see the excerpt in its proper context. These pages provided newspaper and magazine accounts of how IRS agents were illegally using firearms and illegally seizing property in violation of the provisions of 26 U.S.C 7608 and paragraphs 332, 334.2 and 334.3 of the IRS' own "Legal Reference Guide For Revenue Officers" (MT 58[10][0]-14) – excerpts of which Schiff also furnished to the court.

The point is Magistrate Judge Lawrence R. Leavitt ignored all the above examples of how Special Agent Holland and the government misrepresented all of the above provisions in Schiff's books, in the same manner as Magistrate Judge Leavitt ignored all of the documents described in segment **V-A** above, proving that Special Agent Holland had absolutely no authority to engage in any of the activities that resulted in Schiff's indictment. It should be perfectly obvious that Magistrate Judge Lawerence R. Leavitt's "Report" is not based on the actual facts and the pleadings that were filed in this case.

WHEREFORE, all of the points above considered, this Court in the interest of Justice:

1) Should disregard all the recommendations contained in Magistrate Judge Leavitt's "Report & Recommendation," and

2) Dismiss all of the counts against Defendant as contained in the Indictment at issue.

Date: February 9, 2005 Respectfully submitted:

ORAL ARGUMENT DEMANDED

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Irwin Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this date hand delivered a copy of the foregoing Objections to Magistrate Judge Lawrence R. Leavitt's "Report & Recommendation" with respect to Motions to Dismiss #'s 42, 54, 64, and 80, to:

MELISSA SCHRAIBMAN
LARRY J. WSZALEK
Trial Attorneys, Tax Division
US Department of Justice
333 Las Vegas Blvd., South, Suite 5000
Las Vegas, Nevada 89101

And that I have this day mailed a copy of the foregoing by first class mail, to the following Attorney's of record.

CHAD BOWERS, Esq.
Counsel for Defendant Cohen
3202 W. Charleston Blvd.
Las Vegas, Nevada 89102

MICHAEL CRISTALLI, Esq.
Counsel for Defendant Neun
3960 Howard Hughes Pkwy, Suit 850
Las Vegas, Nevada 89109

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Irwin A. Schiff, pro se