No. 06-10199
consolidated with
06-10145 and 06-10201

IN THE U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES,
Plaintiff-Appellee

v.

IRWIN SCHIFF,
Defendant-Appellant

SUPPLEMENT TO APPELLANT'S OPENING BRIEF

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ARGUMENT

The Government's Burden

In Cheek v US, 498 US 192, (1991) the Supreme Court held that the government has a threefold burden in connection with income tax prosecutions, which it stated as follows:

"Willfulness, as construed by our previous decisions in criminal tax cases, requires the government to prove that the law **imposed a duty** on the defendant, that the **defendant knew** of that duty, and that he voluntarily and **intentionally violated** that duty." (Emphasis added)

The government did not meet their burden.

The Government Did Not Prove The Law Imposed a Duty on Defendant

Proof is defined in Ballentine's Law Dictionary, 3rd Edition, as follows:

"Evidence. More precisely, the effect of evidence; the establishment of a fact by evidence..."

The American Heritage Dictionary of the English Language defines "proof" as follows:

"The evidence establishing the validity of a given assertion."

During the trial, Schiff asked Judge Dawson, "When is the Government going to prove that the law imposed a duty on the defendant?" The Government's answer was "We do not intend to prove it, since the Court will instruct the jury on the law." Tr. . Thereby the government admitted it was going to default on its burden of having to prove the law (some law) "imposed a duty" on defendant and would rely on Judge Dawson to meet its burden for them by way of a jury

instruction.

However, a judge's charge to the jury is not "proof" of what the "law" is. Even appellate courts disagree on what the "law" is. Appellate courts get reversed by the Supreme Court based on erroneous applications of the law. But in the instant case, Judge Dawson gave a jury instruction that displayed a totally bizarre understanding of the law.

In Jury Instruction #19, Judge Dawson referred to Code Sections 1, 61, 63 and 6012 and then charged the jury that "These sections, working together, make an individual liable for income taxes." Tr. Such a claim finds absolutely no support anywhere in American jurisprudence.

What makes this instruction even more incomprehensible is that Schiff provided Judge Dawson with a number of relevant pleadings (Trial Docket numbers 14, 66, 78 and 107). Schiff quoted numerous statutes in which Congress specifically made persons "liable" for various federal taxes, such as 26 USC 1461, 4103, 4401, 5005 and 5703--having to do with withholding, petroleum, wagering, liquor and tobacco taxes. In each of those instances, it did not take a number of statutes "working together" to establish the liability in question; <u>one statute did it</u>.

Obviously, it would take only one statute to establish an income tax "liability", if Congress intended to establish such a liability. Congress would not have done so by using four statutes, none of which even mention "liability."

In addition, Schiff provided Judge Dawson with numerous excerpts from court decisions, which were included in Doc #107. These were earlier filed as "objections" to the Magistrate's "Report and Recommendation", Doc #85. They showed that "liability" must clearly appear in the statute allegedly imposing the liability. For example:

"Moreover, even the collection of taxes should be extracted only from persons upon whom a tax liability is imposed by some statute." Botta v Scanlon 288 F2d 504, 506 (Cir.)."Liability for taxation must clearly appear." Higley v Commissioner 69 F2d 160 (Cir.).

While Judge Dawson's jury instruction is in conflict with all of the above, the holding of this Court in Roat v C.I.R. 847 F2d 1379, 81 (9th Cir.) is in harmony with the true meaning of the law. In Roat, appellants argued that "the deficiency provision (in §6211) should be read in conjunction with another statute, 26 USC 6020(b)." In rejecting this argument, this Court stated:

"Nothing in the language of either statute suggests Section 6211(a) should be read together with Section 06020(b). Nothing in the Code's structure suggests the statutes should be read together, either. Section 6020 resides in Chapter 61 of Title 26, governing information and returns. By contrast, Section 6211 resides in chapter 63, governing assessments. See Hartman, 65 C at 545. **Tax policy calls for the statutes to be read independently**." (Emphasis added.)

Similarly, nothing in the language of IRC Sections 1, 61, 63 and 6012 suggests that these statutes should be read together, much less that they "work together" to make persons "liable" for income taxes when the word "liable" does not appear in any one of those statutes. Curiously, not only do all these Code Sections not reside in the same chapter of Title 26, they do not even all reside in

the same Subtitle.

It is clear that this Court's unequivocal holding in Roat that "tax policy calls for the statutes to be read independently" invalidates Judge Dawson's jury instruction and it was plain error for him to have given it. This error was material, fundamental and crucial to Defendant being found guilty on all counts.

Schiff also pointed out in his pre-trial motions (Doc # 85,78, 14, 66) that the Disclosure Notice in a 1040 booklet (page 1 of Schiff's Excerpt of Record) only notifies the public that Code Section 6001, 6011 and 6012 are somehow related to why persons "must file" tax returns. There is no mention in the Disclosure Notice of Code Sections 1, 61 and 63 - much less that they "work together" with IRC Section 6012 to make persons "liable" for income taxes. The Treasury Department, by law, would have to mention this fact in the Disclosure Notice, if these statutes operated in the manner suggested by Judge Dawson.

Therefore, the Government failed to meet its first burden as required by Cheek and, as a result, Defendant's conviction as to all counts must be reversed, based on this gross legal error.

Based on Government Documents, Schiff Cannot be Guilty of Count 17

In Jury Instruction #33 the Court charged the jury, in accordance with Sansone v US, 380 US 343 ( ), that "in order for you to find Mr. Schiff guilty of the charges in Count 17 (with respect to the years 1979-1985) you must find a tax deficiency existed for those years." The jury could not have found that a "tax

deficiency" existed for those years because Government documents prove that no such deficiencies existed in any of those years.

(A) For the Years 1980-85

Included in Schiff's "Excerpts of Record", page 21, are excerpts from the IRS decoding manual "ADP and IDRS Information." It shows that a transaction code (TC) 300 indicates an "additional tax or deficiency assessment." Pages 3-8 of Schiff's Excerpts of Record contain IRS documents that were introduced at Schiff's criminal trial that showed income tax assessments and other tax activities for the years 1980-1985.

Each record shows an entry coded 300 and identified as "additional tax assessed by examination." These entries represent the "deficiencies" for each of those years and they are all shown as "0.00". They show no deficiencies existed for any of the years 1980-1985, and pursuant to Sansone v US, *supra*, Schiff cannot be guilty of the charges in the Indictment for any of the years 1980-1985 because no deficiencies existed in any of those years.

(B) For the Year 1979

Showing that there was no valid deficiency for the year 1979 is slightly more complicated. Schiff has included in his "Excerpts of Record", pages 9-13, the IRS documents showing all of the assessment and other income tax activity with respect to him for the year 1979.

It shows a TC 150 entry as of 05-20-1985, which claims that a "return was

filed" and an assessment was made. The amount claimed to have been assessed was "0.00." In other words, no actual tax liability was assessed as of that date.

However, the IRS recorded a "return filed" for that year. In this Court's ruling of Sept 11th 2006 (US v Schiff - Docket # 05-15233) this Court stated: "Schiff filed no tax return in 1979." It's a matter of res judicata that he didn't file a return for 1979. Does the IRS have the power to ignore this Court's rulings?

The return referred to in that entry was a "dummy" return prepared by the IRS as shown in Schiff's Excerpts of Record at page 14. If one were to ask the IRS what statute authorized the IRS to prepare such a "dummy" return, they would say §6020(b). However, §6020(b)(2) states:

"Any return so made and subscribed to by the Secretary shall be *prima facie* good and sufficient for legal purposes."

In order for this "substitute [dummy] return" to be good for anything, it had to be "subscribed to" by the Secretary of the Treasury or his delegate, but this return was not "subscribed to" by anybody. Therefore it was not good for any purpose whatsoever. In Viara v C.I.R., 444 F 2d 770, 777 (Cir.), the court stated:

"Accordingly it has been held that a return filed unsigned is no return at all; Dixon v C.I.R., 28 TC 338 (1957)."

In addition, §6020(b) does not indicate that returns prepared pursuant to it are "Substitute" returns. The returns contemplated by §6020(b) are, obviously, actual returns (not substitutes) from which legitimate assessments can be made.

Therefore, it is clear that the "return" referred to as a TC 150 can serve no

legal purpose. While the 0.00 assessment associated with it was in fact illegal, §6203 makes clear that the Secretary is authorized to assess only "the liability of the taxpayer."

In claiming to have assessed "zeros" as Defendant's tax "liability" the Secretary would have assessed an absence of a liability and the law does not allow the Secretary to assess, as a liability, the absence of one. Thus, it is clear that the TC 150 entry on that document was both fraudulent and illegal, thus invalidating every succeeding entry, including the $44,199 alleged deficiency.

In addition, the $44,199 alleged deficiency was determined by the Tax Court, not the IRS. 26 USC 6215 states, in relevant part:

"...the entire amount determined as the deficiency by ... the Tax Court shall be assessed and shall be paid upon notice and demand from the Secretary." [Emphasis added.]

26 USC 6303 requires that the notice and demand be sent out "within 60 days after the making of an assessment..."

Since the document shows that 1979 assessments were made on 5/20/85 and 9/3/92, a "notice and demand" for payment had to be sent out before 7/20/85 and 11/3/92. However, an examination of the five pages constituting Schiff's 1979 income tax activities reveals that no "notice and demand" for payment was ever sent to Schiff for that year.

Therefore, not only was this failure "fatal to the acquisition of the government's lien" against Schiff (US v Coson, 286 F2d 453 (9th Circuit 1961)

but its deficiency determination was never finalized by the sending out of a notice and demand for payment, as required by 26 USC 6215.

Therefore, Schiff's 7201 conviction as contained in Count 17 must be reversed and dismissed because no deficiencies existed in any of the years at issue.

Jury Instructions 20, 24 and 25 Were All Given Contrary to Law

Apart from the erroneous Jury Instruction #19, already discussed, the Court gave a number of other erroneous jury instructions, three of which are discussed as follows.

In Jury Instruction 25 the Court instructed the jury that "the Internal Revenue Service... is an agency of the United States." That instruction is incorrect, as Schiff pointed out to the Court at a jury instruction conference in chambers. (Tr.) Congress never passed a law establishing the IRS as an agency of the federal government; so the IRS cannot be "an agency of the United States" as the Court charged in this instruction. Congress merely created the office of Commissioner of Internal Revenue as an office within the Treasury Department when it passed the Revenue Act of 1862 - and that is as far as it got.

Schiff objected to this instruction, and giving it did not amount to "harmless error" because it invalidates Jury Instruction 24. Schiff could not have been guilty of "impeding, impairing obstructing and defeating the Internal Revenue Service on ascertaining, computing assessing and collecting taxes in

violation of 18 USC 371" as stated in Jury Instruction 24, because (a) the IRS does not exist as a federal agency and (b) Congress never gave the IRS or the Commissioner any authority to "ascertain, compute, assess or collect" income taxes as charged in Jury Instruction 24. All such authority (in the 1954 Code) was given only to the Secretary of the Treasury, who was also authorized to delegate such authority, pursuant to 26 USC 7701(12), to "any officer, employee or agency of the Treasury" **but it was never done**.

For the Secretary to have legally delegated his authority to enforce the income tax to the Commissioner (who could then redelegate his authority to lower level Treasury employees in his Department) the Secretary would have had to (i) issue such an order and (ii) publish it in the Federal Register. Section 1505 of Title 44 requires that "every document" having "general applicability and legal effect" be published in the Federal Register. But no such delegation order has ever been published.

The Government's claim, in response to this objection, is that any such delegation order is an internal Treasury Department document, so it would not need to be published, is totally without merit. Because it was <u>not published</u> the authority of the IRS over Schiff is without "legal effect".

In addition, the claim in Jury Instruction #20 regarding delegation of authority, such as "The actual task of collecting the taxes, however, has been delegated to the local IRS directors" and "The delegation of authority down the chain of

command, from the secretary to the Commissioner of Internal Revenue, to local IRS employees, constitutes a valid delegation by the Secretary to the Commissioner and a redelegation by the Commissioner to the delegated officers and employees" are all without merit.

In order for the Commissioner to have an authority capable of being "redelegated" his original delegation of authority would have to have been published in the Federal Register; but it was not. Therefore, all claims in Jury Instruction 20 with respect to the alleged authority of the IRS based on its receiving "redelegations" of authority from the Secretary have no legal substance and are without merit.

Therefore, Jury Instructions 20, 24 and 25 instructed the jury contrary to law. This amounted to gross plain error and the error was not "harmless." The challenged instructions gave the jury a totally erroneous understanding of the legal authority of the IRS and the Schiff's conviction must, accordingly, be reversed on this ground.

Judge Dawson Gave an Erroneous Charge with Respect to the Definition of Income

Jury Instruction #44, charged the jury that "Gross income includes the following..." The Court then listed such items as: compensation for service, interest, rent and dividends. The implication is that such items are made specifically taxable by the 1954 Code. However, no such wording appears in

Section 61 of the 1954 Code. Repealed Section 22 of the 1939 Code did contain such wording.. So rather than charge the jury on the law as it presently appeared in the 1954 Code, the Court charged the jury on the law as it appeared in the repealed 1939 Code.

Section 61 of the 1954 Code is captioned "Gross income defined." It then goes on to "define" it by saying "Gross income means all income from whatever source derived." Therefore, since Section 61 "defines" "Gross income" with the word "income", one has to know the meaning of "income" in order to know the meaning of "gross income." But since the Code does not define "income", it therefore does not define "gross income" despite the claim in the caption of Section 61.

In Eisner v Macomber, 252 US 189, 206 ( ) the Supreme Court explained why the

definition of "income" does not appear in the Code: Congress has no authority to define the meaning of "income." The Court stated:

"In order, therefore, that the clause cited from Article I of the Constitution may have proper force and effect... it becomes essential to distinguish between what is and is not "income"... **Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution."** (Emphasis added)

To understand the meaning of "income" we must look outside the

Code. In adopting the 1954 Code both the House (in House Report 1337) and the Senate (in Senate Report 1622, excerpts from which are shown in Schiff's "Excerpts of Record" pages 15 and 16) stated that "income" is used in Section 61

of the 1954 Code in its "constitutional sense."

Schiff, in his proposed jury instructions, requested that the Court instruct the jury that "income" as used in Section 61 of the Internal Revenue Code is used in its "constitutional sense" in accordance with the intent of Congress as expressed in those Congressional reports. However, Judge Dawson refused to do so, and instead of charging the jury correctly as to the meaning of "income" he incorrectly charged the jury in violation of a number of Supreme Court decisions, as follows.

In Pollock v Farmers Loan & Trust Co 158 US 601, 637 (1895) the Supreme Court held the Income Tax Act of 1894 "unconstitutional and void because not apportioned." This case was included as page 17 in the "Excerpts of Record." In so doing the Court also said that income taxes that "fall on the income of real estate and personal property" are "unconstitutional and void" unless apportioned.

Page 18 of Defendant's "Excerpts of Record" is the latest excerpt from Shepard's citations. It shows that the Pollock decision has never been reversed, overturned or repealed, and thus it still remains the "law of the land." A law that Jury Instruction 44 blatantly violated.

Therefore, when the income tax of 1913 came before the Supreme Court in Brushaber v Union Pacific Railroad 240 US 1 (1915), the Supreme Court fashioned a different meaning for "income"; one that would not conflict with the meaning given it in the Pollock decision, which the Brushaber Court said it was

not "challenging."

The Brushaber Court pointed, somewhat obscurely, to the new meaning for "income" when it stated (at page 17) that:

"The whole purpose of the Amendment was to relieve all income when imposed from apportionment from a **consideration of the source** whence the income was derived. (Emphasis added.)

So a tax on income did not have to be apportioned if the "source" of that income was not "considered" and thus not taxed. However, this only occurs when an income tax is imposed on corporate profits since, in that case, the sources that generate the profit are not "considered" and are not separately taxed. This of course is the 16th Amendment meaning of "income" as referred to in those Congressional Reports as well as the meaning of "income" in the "constitutional sense."

For example: in Stratton's Independence Limited v F W Howbert 231 US 399 (1913), the Supreme Court said that the Corporation Excise Tax of 1909 was:

"not an income tax, but an excise upon the conduct of business in a corporate capacity, measuring, however, the amount of the tax by the income of the corporation." At p. .

Thus the Supreme Court used the words "income" and corporate "profit" I interchangeably, since the amount of the tax was actually based on the corporation's "profit", not on its "income".

The decision in Merchant's Loan & Trust v Smietanka, 255 US 509, 518 ( ) makes clear that "income" in all of the Income Tax Acts of Congress meant the

same thing as in the Corporate Excise Tax Act of 1909, since the Court held:

"There would seem to be no room to doubt that 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 Tax Act and what that meaning is has now become definitely settled by decisions of this Court."

That "income" in our revenue laws means the same thing as it did in the Corporation Excise Tax of 1909 was also held in Southern Pacific v Lowe 247 US 330 (1918); Burnet v Harmel 287 US 103, 108 (1932); Bowers v Kerbaugh-Empire Co 271 US 887 (1926) and Doyle v Mitchell 247 US 179 (1918). Extensive excerpts from all these decisions were included in numerous memoranda filed by Defendant; see Docket Numbers 15, 66, 78 and 107.

Therefore, in charging the jury that such items as compensation for service (i.e., wages), interest, rent and dividends were directly taxable as "income", the Court was instructing the jury that income from real estate and personal property were taxable as "income" (even if not apportioned) in direct violation of the Pollock decision.

A tax on rent is obviously a tax on income from real estate. A tax on interest is a direct tax on the money (personal property) that generated the interest. A tax on dividends is a direct tax on the stock (personal property) that generated the dividends. And a direct tax on compensation (i.e. wages) is a direct tax on the labor that generated that compensation.

Therefore, Jury Instruction 44 was given in violation of both bedrock Pollock and

Brushaber decisions, as well as all of the Supreme Court decisions and the Congressional Reports referred to earlier. Thus the jury was misled concerning the legal meaning of "income", a proper understanding of which was crucial to a proper understanding of the Indictment Counts, pursuant to which Schiff was accused. The jury was misled and its entire verdict based on this false understanding of the legal meaning of "income" must be vacated.

The Court Erred in Not Giving the Bishop Instruction

In United States v Bishop 412 US 346, 361 (1973), the Supreme Court stated:

"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..."

However the District Court refused to give such a jury instruction even though the Court knew, based on the contents of over a dozen pre-trial motions filed by the Defendant that the defendant relied on a number of Supreme Court decisions in forming his understanding of the federal income tax.

For the Court not to have given such an instruction based on the Supreme Court holding in Bishop (because it might cause Schiff to be found Not Guilty) was characteristic of how Judge Dawson treated Schiff's attempts to defend his conduct. Judge Dawson refused to instruct the jury concerning a significant aspect of "willfulness"

Not content with misleading the jury with respect to various aspects of the tax Law, Judge Dawson insisted on further misleading the jury during the Government's case in chief. At Tr. 3542 the court gave an "interim

instruction" that was unnecessary and contained numerous misstatements of law. Over Schiff's objections, the trial court misled the jury by making the following false claims as part of its interim instruction:

1) "The law makes individuals liable to pay income taxes."

But no such law exists. If it did, the court would have identified "the law" but no The court identified such "law".

2) "Taxable income is defined in section 63."

Taxable income is not defined in section 63, for the simple reason that its "definition" in that statute is made dependant on the definition of "income" which See, Eisner v. Macomber, supra. The legal meaning of income was contained in the aforestated Congressional Reports. This was brought to Judge Dawson's attention but he willfully and skillfully ignored Schiff's protestations.

In addition, Judge Dawson states in his interim instruction that "wages and salaries" are "included" in "income" as that term is used in section 61. This was a totally false and a misleading instruction, as previously explained

Judge Dawson also states that "under Internal Revenue Code Section 6012 individuals are required to file an income tax return." Tr. . This instruction is false. There is no provision in section 6012 that states that persons are "required" to file tax returns. If such a provision applied to income tax it would be found in Subtitle A, not in Subtitle F. In addition, section 6012 refers to persons who "shall" file returns, not that they are "required" to do so. And the use of "shall"

(and not the word "required") in that context is the equivalent of "may."

In Cairi and Fulton R.R. Co. v. Hect, 95 U.S. 170 ( ), the Supreme Court held:

"As against the government the word 'shall' when used in statutes is to be construed as 'may'; unless a contrary intention is manifest." See also Ballow v. Kemp, 92 F2d 556 (Cir.,).

If section 6012 "required" the filing of an income tax return, it would be so stated in the Disclosure (Privacy) Act Notice in a 1040 booklet. (Page 1 of Schiff's 1st set of Excerpts of Record), but is not. The error here is further compounded by the statement that one is "required" to file "without assessment or Notice and Demand." There is absolutely no statute, nor any directive from the Treasury Department that states any such thing. It is obvious that the court here is simply making up laws that it thinks might be helpful to the Government.

Next the court states that such sections as: Sections 1, 61, 63 and 6012 (as referenced in paragraphs two and three of page 3542 line 15-16) "working together make an individual liable for income taxes." See Argument, supra.

Thus each and every "Interim instruction" given by the court was contrary to law

and the information given the public, as contained in the "Disclosure Act Notice" as contained in the 1040 booklet. Schiff made the court aware of this before he gave his instruction. See, Tr. 3527-29, 3535-36, 3538. Schiff stated,

"the court is fully aware that in adopting the '54 Code in House Report No. 1337 and Senate Report 1622 the U.S. Congress showing its intent in these committee reports, specifically said that income is used in its constitutional sense."

And in instructing the meaning of income to the jury in his "interim instruction", the Judge Dawson had to know that he was not instructing the jury in conformity with those Congressional Reports.

Both the Government prosecutors and Judge Dawson sought to mislead the jury into believing that the mere imposition of a tax was tantamount to making persons "liable" for the tax. However Schiff explained how Code Sections 4402(c) and 4401(a); and 5701 and 5703 first imposed the tax, and subsequently stated who was "liable" and who must "pay" the tax "imposed." Schiff goes on to state:

"So, the imposition of the tax and the liability for the tax are two different things…This is a totally illegal and erroneous jury instruction and I vigorously object." Tr. 3529

In addition to misleading the jury with respect to the law, the following are some representative examples of how Judge Dawson based his rulings on how they might hurt or help the Government's case.

WITNESS CHRISTY MORGAN

Ms. Morgan identifies herself as "The civil penalty coordinator in the Frivolous Filer Department in the Examination Branch." She states, "I assess the $500 frivolous return penalty while working with counsel regarding arguments (and) asking for legal discussions." Tr. 1535-36.

It is obvious that Schiff had trouble reconciling her authority to determine that returns are frivolous and imposing penalties with her claim and Judge Dawson's claim that she:

"doesn't claim to be an expert in taxes. She testified what she did. And if you want to cross-examine her but your objections makes no sense to me. You don't like what she did." Tr. 1538.

Schiff states that he had "no objection to what she did," but wanted her qualified as an expert so he could cross-examine her in the law she was applying when she determined a return was frivolous. On cross-examination, Schiff attempts to elicit from her "exactly how the frivolous penalty was imposed." Tr.1622. According to her, when the IRS received a frivolous return, if it was something that had not been identified she would:

"write area counsel, they would research case law, and come up with a decision. It was then passed through the manager, or it could be passed through the national office counsel for approval. And, in turn, we get a written decision back stating, yes... " Tr. 1622.

Schiff asks her:

"Was there any document that said who actually determined who imposed the penalty itself?…Area counsel determined it." Schiff then asks her: "no document, you supplied us with stated who took responsibility for imposing the penalty?" Tr. 1623.

It is clear from Ms. Morgan's responses that no particular party signed a document or took personal responsibility for imposing the frivolous penalty. Schiff then asks her if she were familiar with the statute that explained how a frivolous penalty is supposed to be imposed. The transcript shows some mix-up

between Code section 6801, which establishes the penalty, and section 6751,which explains "how the penalty is imposed."

Seeking to enter Code section 6751 into evidence, Schiff hands a document to Mr. Ignall, one of the prosecutors, who offers no objection to its admission. Tr. 1625. The court then asks Schiff, "All right now what is the relevance of this?" Schiff explains that the statute is "directly related (to) how a (frivolous) penalty gets assessed", which is the very subject of Ms. Morgan's testimony. Judge Dawson then asks for the document. He identifies it as section 6751 of the Internal Revenue Code. Tr. 1626. The statute provides as follows, in pertinent part:

"1) In general. No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate."

The statute clearly reveals Ms. Morgan's section did not impose the frivolous penalty on Schiff. Undoubtedly the court recognized this when it read the statute causing Judge Dawson to say, "I've read it, and it doesn't matter." Tr. 1627 So the court refused to admit the tendered exhibit.

Apparently it "doesn't matter" whether or not the IRS imposes penalties according to the law. According to Judge Dawson the IRS is free to impose penalties anyway it likes, and it "doesn't matter" what the law says. Obviously he did not want the statute to be admitted, since he did not want the jury to find out that the IRS imposes penalties in violation of law. Such a discovery by the

jury might prejudice the government's case.

WITNESS LUDDIE TALLY

Mr. Tally is identified as an IRS Revenue Officer for about 20 years. Tr. 2954. Mr. Tally explains how he uses liens and levies to "take assets from the taxpayer. It's an involuntary payment." Tr. 2959. Tally explains how in 1995, he "prepared the necessary papers to seize Mr. Schiff's automobile And I went out that afternoon and seized Mr. Schiff's automobile." Tr. 3001-04. Mr. Tally further testifies how he issued a levy and seized 100% of Schiff's monthly Social Security benefit. Tr. 3012, 3016.

Schiff asks Tally (laying a foundation) "Did you ever hear of pocket commissions?" and Tally replies, "Yes, Sir." Continuing, Schiff asks "How many kinds of pocket commissions, does the IRS issue?" Before Tally can answer, the prosecutor interrupts with an objection. "I'm going to object -relevance." Tr. 3108-09

Judge Dawson asks Schiff: "What is the relevance of this?" and Schiff states:

"I want to ask him what kind of a pocket commission he has. I am about to prove to the jury that Mr. Tally had no authority to make all those seizures he testified to, including taking Schiff's automobile and his Social Security benefits, because Mr. Tally will have to admit to only having a non-enforcement pocket commission." Tr. 3109

This was explained in the IRS document taken from the IRS Handbook 1.16.4 (included as Document No. 2 in Schiff's accompanying Excerpts of Record). However, both the Government and the Judge Dawson knew where Schiff was

going with this (and how devastating it would be to the Government's case) since Schiff had raised the issue of pocket commissions in pre-trial motions. Therefore, both the Government and the court knew that Tally had no legal authority to make the seizures he testified to, both from the fact that he had a non-enforcement pocket commission, and his job description meant he fell into subsection (a) of section 7608, meaning that he could only be authorized to enforce such taxes as liquor, tobacco, and firearms and such other taxes that fell into Subtitle E.

In any case, Judge Dawson sustained the objection on the ground that it is irrelevant as to what kind of pocket commission Tally has. Presumably Tally would have as much authority to seize property with a non-enforcement pocket commission as he would have with an enforcement commission.

Judge Dawson states: "If you want to show that he didn't have authority then you can call someone." Tr. . However, when Schiff called John Turner, who had been a revenue officer for 8 years, and who was prepared to testify that he resigned from the IRS when he discovered he did not have the legal authority to seize property, and was doing so only on the basis of fraud and intimidation, Judge Dawson only allowed him to testify as a character witness.

It is clear that Judge Dawson closely monitored Turner’s testimony to make sure he stayed within Dawson’s narrow limits. Tr. 3123-24. Schiff was not allowed to call witnesses to show that Tally did not have any enforcement

authority.

Schiff states to Judge Dawson (out of the presence of the jury) that the:

"IRS issues two kinds of pocket commissions, enforcement and non-enforcement pocket commissions, and (Tally) has a non-enforcement pocket commission, which means he has no enforcement authority within the law and you did not allow me to bring this out."

In response, Dawson states: "He has authority," and Schiff replies, "but he has a non-enforcement pocket commission." And Dawson states, "I don't care about pocket commissions, the witness has authority. He is an employee of the Internal Revenue Service. He has authority." So Schiff asks, "But why didn't you let me ask him what kind of a pocket commission (he has)?" And Dawson replies, "Because it has nothing to do with this." Tr. 3124

How can Agent Tally's authority to seize property have "nothing to do" with the type of pocket commission he has, since the purpose of these commissions is to establish the authority of the IRS employee to seize property? Suffice it to state, that Judge Dawson "didn't care about pocket commissions" because if he did, and Tally were forced to admit he only had a non-enforcement pocket commission, it would weaken the government's case. So Judge Dawson pretended that a document that was highly relevant to the defense was irrelevant.

WITNESS CLINT LOWDER

Mr. Lowder is identified as an IRS revenue agent with 30 years of experience. Tr. 3970-71. He states that he had "specialized

training in expert witness and in summary witness training." Tr. 3972-73. The Government states that Mr. Lowder is an "expert in tax computations." Tr. 3972. Schiff asks, "I want to know the difference between being an expert on the law and being an expert in tax computations." Mr. Neiman, one of the prosecutors, states:

"Mr. Lowder will take general accounting principles as defined in the law in order to show what Schiff's business income was for the years charged in the indictment." Tr. 3973.

Schiff suggests that this tortured distinction was contrived to allow Government witnesses in tax trials to appear to be experts in <u>something</u> other than the law. Therefore, they can't be cross-examined about the law. Schiff objects and points out that the use of the word 'income' is a legal conclusion:

"There are a hundred pages in 'Words and Phrases' on the meaning of 'income'. If he wants to testify that I made certain (bank) deposits, that's okay with me. But whether these deposits constitutes 'income' within the meaning of the law is a legal conclusion and he doesn't have the background and training to testify as to what constitutes 'income'. If he does, I want to cross-examine him on his understanding of the word 'income.'" Tr. 3975-76

Judge Dawson rules that Schiff's objection is premature. "You have interrupted (him) before he has testified. you can raise it when it is timely." Tr. 3975-76.

Mr. Lowder states that "in each and every examination (and he testified he had done between 1,500 -2,000), I would have to determine what constitutes income." Therefore Schiff now timely objects and states:

"He's determining (income) in the ordinary sense he can't use the word 'income' unless the Government puts on a witness to define the term 'income' (since) 'income' is not defined in the Internal Revenue Code." Tr. 3976.

In response, Mr. Neiman, now reminds the court that it "has already instructed the jury as to what 'income' is." Judge Dawson then states:

"The Court has given the jury a definition of 'income' and an interim instruction. That is the law of this case. your objection is overruled." Tr. 3977.

Therefore, Mr. Lowder was never required to explain where he got his definition of income from, whether or not he computed income in the ordinary sense, or in the constitutional sense, or even if he understood the difference.

Mr. Lowder states in cross-examination that he was attempting to reconstruct Schiff's income for the years 1997 through 2002" - years that Schiff reported he had zero income. Schiff had no income in the constitutional sense in any of those years. Schiff then asks him whether he was making that computation legally or illegally. Mr. Lowder responded by claiming that, he was doing it legally. Tr. 4142

Therefore Schiff asks him (while holding a copy of the IR Code in his hand), "Did you ever see a law that allowed you to do that?" Mr. Neiman objects, but states "I'd like to hear the answer." Tr. 4142. Schiff asks: "Can you take your Code book (which Schiff attempted to hand him) and show me a law where you are authorized to do that." Judge Dawson states: "Mr. Schiff, the Court will instruct on the law move on." Tr. 4142.

Judge Dawson could never instruct on a law that states that revenue agents such as Mr. Lowder are authorized to determine someone's total tax, since no such law exists.

Mr. Lowder had already testified that what he was doing, he was doing "legally." Therefore he had to be familiar with a law that allowed him to calculate defendant's "total taxes" for the years 1997-2002, which he testified he had done thousands of times. There is no statute in the Internal Revenue Code that allows the Secretary (let alone the IRS) to determine a person's "total tax," as Mr. Lowder claimed to have done here.

Therefore, Judge Dawson prevented Mr. Lowder from having to produce the statute at issue. Lowder's inability to do so would have substantially undermined the prosecution's case and would have bolstered the defense.

CONCLUSION

There would be no point in providing this Court with additional examples that showed how the trial court issued irrational and prejudicial rulings in the interest of promoting the Government's case, while frustrating Schiff's ability to defend himself. The above examples should be proof enough.

Based on the number and gravity of the trial court's erroneous jury instructions (given twice to the jury over defendants objections) and the erroneous evidentiary rulings, it is clear that Schiff received an unfair trial and the judgment of conviction should be reversed and the case sent back to the District Court for a retrial before a Judge other than Judge Dawson.