

Schiff

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 IRWIN SCHIFF, )  
 )  
 Defendant. )

CR-S-04-119-KJD-LRL  
Motions to Dismiss  
(#42, 54, 64, and 80)

REPORT & RECOMMENDATION

This case comes before the court on Schiff's second round of separately filed Motions to Dismiss. The four submissions include Schiff's: (1) Motion to Dismiss Counts 18-23 Because the Tax Returns at Issue Were Not Filed Voluntarily (#42); (2) Motion to Dismiss Count One of the Indictment (#54); (3) Motion to Dismiss All Counts in the Indictment Involving Him Based on His Reliance on Supreme Court Decisions and Other Government Claims (#64); and (4) Motion to Dismiss Since the Indictment was Based on the False & Unauthorized Claims of IRS Special Agent David W. Holland (#80). They will be considered *seriatim*.

1. *Motion to Dismiss Counts 18-23 Because the Tax Returns at Issue Were Not Filed Voluntarily (#42):*

Having considered the motion, the government's Opposition (#72), and Schiff's Reply (#96) and Amended Reply (#104), the court finds that Schiff's motion is frivolous. Schiff contends that his 1997-2002 federal income tax returns are not admissible because the government obtained the returns by means of his compelled self-incrimination. Binding precedent has clearly held that the disclosure of financial information on a tax return does not

1 violate one's Fifth Amendment right against self-incrimination. *See Flint v. Stone Tracy Co.*,  
2 220 U.S. 107, 177 (1911); *United States v. Neff*, 615 F.2d 1235, 1238-41 (9<sup>th</sup> Cir. 1980).

3 2. *Motion to Dismiss Count One of the Indictment (#54):*

4 The court has considered the motion, the government's Opposition (#70), and Schiff's  
5 Reply (#98). Count I of the indictment charges Schiff and his co-defendants with a conspiracy  
6 "to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating,  
7 through deceitful and dishonest means, the lawful government functions of the Internal Revenue  
8 Service of the United States Department of Treasury in ascertaining, computing, assessing, and  
9 collecting taxes" in violation of 18 U.S.C. § 371. 18 U.S.C. § 371 allows for prosecution of a  
10 conspiracy either to commit an offense *or* to defraud the United States. Schiff contends that  
11 Count I should be dismissed because he cannot be convicted "under the defraud clause of  
12 section 371." Mot. (#54) at 7. The court disagrees.

13 Schiff's reliance on *United States v. Minarik* is misplaced. 875 F.2d 1186 (6<sup>th</sup> Cir. 1989).  
14 The underlying facts in *Minarik* are distinguishable from the instant case. In *Minarik* the court  
15 held that the defendants should have been charged under the "offense clause" of §371 because  
16 the government had "used the defraud clause in a way that created great confusion about the  
17 conduct claimed to be illegal." *Id.* at 1196. The court was concerned primarily because (1) the  
18 indictment failed to adequately notify the defendants of the charges, and (2) the government  
19 repeatedly changed its theory throughout the trial. *Id.* Here, unlike in *Minarik*, it is clear that  
20 the object of the conspiracy was to impair and impede the functions of the IRS rather than to  
21 commit a specific offense. *Cf. United States v. Notch*, 939 F.2d 895, 901 (10<sup>th</sup> Cir.  
22 1991)(holding that the "defraud" clause was proper where "[t]he object of the conspiracy went  
23 beyond filing tax returns."). The court therefore finds that Count I properly charges the  
24 defendants with a conspiracy to defraud the United States. *See, e.g., United States v. Klein*, 247  
25 F.2d 908, 915 (2<sup>nd</sup> Cir. 1957)(a conspiracy to defraud is typically charged where the government  
26 alleges the defendant conspired to defraud the United States for the purpose of "impeding,

1 impairing, obstructing and defeating the lawful government functions of the Department of the  
2 Treasury in the collection of the revenue: to wit, income taxes.”).

3 3. *Motion to Dismiss All Counts in the Indictment Involving Him Based on His Reliance on*  
4 *Supreme Court Decisions and Other Government Claims (#64):*

5 Having considered the motion, the government’s Opposition (#75), and Schiff’s Reply  
6 (#100), the court finds that Schiff’s motion to dismiss the indictment based on his “good faith”  
7 defense is improper. Determination of a defendant’s willfulness is a factual question for a jury  
8 to determine after examining the evidence presented at trial. *See, e.g., United States v. Powell,*  
9 *955 F.2d 1206, 1214 (9<sup>th</sup> Cir. 1992).* The motion must therefore be denied.

10 4. *Motion to Dismiss Since the Indictment was Based on the False & Unauthorized Claims*  
11 *of IRS Special Agent David W. Holland (#80):*

12 Having considered the motion, the government’s Opposition (#91), and Schiff’s Reply  
13 (#101), the court finds that Schiff’s arguments are redundant and without merit. This court has,  
14 on more than one occasion, addressed and rejected nearly all of the arguments asserted by Schiff  
15 in his Motion (#80). *See Report & Recommendation #85, #95.* With the exception of one  
16 allegation, Schiff fails to show that SA Holland made false statements in his affidavit.  
17 Moreover, even assuming that Holland’s inaccurate statement regarding Schiff’s 1977 tax  
18 conviction was made knowingly and intentionally, or with reckless disregard for the truth,  
19 redacting the statement does not change the ample probable cause justifying the search. *See,*  
20 *e.g., Franks v. Delaware, 438 U.S. 154, 170 (1978); see also United States v. Senchenko, 133*  
21 *F.3d 1153, 1158 (9<sup>th</sup> Cir. 1998)*(where erroneous statements are included in an affidavit  
22 supporting a search warrant the court must determine “whether with the affidavit’s false  
23 material set to one side, the affidavit’s remaining content is insufficient to establish probable  
24 cause”). Accordingly, dismissal is not warranted.

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1 **RECOMMENDATION**

2 Based on the foregoing, it is the recommendation of the undersigned United States  
3 Magistrate Judge that Schiff's Motions to Dismiss (## 42, 54, 64, and 80) should be denied.

4 **ORDER**

5 IT IS ORDERED that Schiff's Motion to File an Amended Reply (#104) is GRANTED.

6 DATED this 10<sup>th</sup> day of January, 2005.

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**LAWRENCE R. LEAVITT**  
9 **UNITED STATES MAGISTRATE JUDGE**

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