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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA	:	
v.	:	**Civil Case No. 09-CV-01274**
	:	**Crim. Case 2:04-CR-00119-1- KJD**
IRWIN SCHIFF,	:	
Defendant-Movant.		

MEMORANDUM IN AID OF DETERMINATION
UNDER FED.R.GOV. § 2255 PROC. 4(b) AND IN SUPPORT OF
AMENDED MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255

On June 14, 2009, the defendant-movant, Irwin Schiff, filed a motion pursuant to 28 U.S.C. § 2255 to vacate his judgment of conviction and sentence. On August 13, 2009, the prosecution moved to dismiss that motion without prejudice as untimely, because the defendant's judgment of conviction had not yet become final. The defendant opposed the government's motion,

but this Court never ruled on it. The defendant has now filed an amended motion pursuant to 28 U.S.C. § 2255. The amended motion alleges, as did the initially-filed motion, that Mr. Schiff was deprived of his Sixth Amendment right to the effective assistance of counsel on direct appeal. (Grounds One through Three). Should this Court conclude that Mr. Schiff received effective assistance of counsel on appeal, it must nevertheless correct the judgment to reflect the 115-month sentence this Court actually imposed. (Ground Three.)[1] The motion is verified, under penalty of perjury.

This memorandum is filed contemporaneously with and in support of the amended motion, as well as in support of movant's request that the Court issue an Order directing the United States to file an answer to the motion. 28 U.S.C. § 2255(b); Fed.R.Gov. § 2255 Proc. 4(b); see *Fontaine v. United States,* 411 U.S. 213 (1973) (per curiam). This standard is enforced through § 2255 Rule 4(b), which states that unless "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief," the Court must "order the United States to file an answer, motion, or other response within a fixed time." For the following reasons, the Court should direct that an answer be filed, and then, upon full hearing, grant the requested relief.

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[1] Ground One and Three of the amended motion raise essentially the same issues raised in Grounds One and Three of the initially-filed motion. Ground Two of the initially-filed motion claimed that "this Court must vacate the defendant's conviction and grant him a new trial if, in light of the Supreme Court's decision in *Indiana* v. *Edwards,* 554 U.S. -, 128 S.Ct. 2379 (June 19,2008), and *United States* v. *Ferguson,* 560 F.3d 1060 (9th Cir. 2009), it would have denied defendant Schiff's request to represent himself at trial and instead required him to be represented by counsel." The amended motion no longer makes that claim. Instead, Ground Two raises an additional basis for finding that Mr. Schiff was deprived of his Sixth Amendment right to the effective assistance of counsel on direct appeal.

I. Procedural History

On March 24, 2004, Irwin Schiff and two other co-defendants were named in a 33-count indictment filed in this Court. Mr. Schiff, the lead defendant, was named in thirteen of those counts. Count one charged a *Klein* conspiracy in violation of 18 U.S.C. § 371.[2] Counts Two-Six charged Mr. Schiff with aiding and assisting in the filing of false income tax returns, in violation of 26 U.S.C. § 7206(2). Count 17 charged that Mr. Schiff had attempted to evade and defeat the payment of his own income tax for the years 1979-85, in violation of 26 U.S.C. § 7201. Counts 18-23 charged him with filing false personal income tax returns for himself for the years 1997-2002.

Following a 23-day trial in which Mr. Schiff represented himself, he was convicted on all counts. Mr. Schiff was represented at sentencing by Michael Nash, Esq., a Chicago-based attorney. On February 24, 2006, this Court sentenced Mr. Schiff to a complex series of concurrent and consecutive terms of imprisonment, which it stated added up to 151 months, but which actually added up to 115 months, to be followed by a 12-month consecutive sentence for contempt. The defendant filed a timely notice of appeal.

On December 26, 2007, the Ninth Circuit issued two opinions, one published and one unpublished, which rejected all but one of the issues raised on appeal. See *United States v. Cohen,* 510 F.3d 1114 (9th Cir. 2007); and *United States v. Cohen,* 262 Fed.Appx. 14 (9th Cir. 2007). In the precedential opinion, the Court of Appeals vacated Mr. Schiff's contempt convictions and

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[2] See (*United States v Klein,* 247 F.2d 908 (2d Cir.1957), *cert. denied,* 355 U.S. 924 (1958)).

remanded the case "to allow the district court to file the requisite contempt orders pursuant to Federal Rule of Criminal Procedure 42(b)." 510 F.3d at 1127. The Court also held that "Any sentence reimposed must not exceed eleven months," but allowed the "district court ... discretion to impose the contempt punishment to run consecutively to the sentence for the tax convictions." The Court of Appeals denied a timely-filed rehearing petition on April 18, 2008.

On May 27, 2008, pursuant to the Ninth Circuit's order, this Court entered and filed fifteen written Contempt Orders. On September 5, 2008, the Court reinstated the findings of contempt and imposed a total consecutive sentence of eleven-months pursuant to those findings. Mr. Schiff filed a timely Notice of Appeal on September 17, 2008. The Court of Appeals affirmed on June 11, 2010. *United States v. Schiff,* 383 Fed.Appx. 649 (9th Cir. 2010). The defendant petitioned the Supreme Court for a writ of certiorari, which the Court denied on November 1, 2010. 131 S.Ct. 532 (Nov. 1, 2010).

On June 14, 2009, while the appeal from the contempt orders and sentence was still pending, the defendant-movant filed a motion pursuant to 28 U.S.C. § 2255 to vacate his judgment of conviction and sentence. On August 13, 2009, the prosecution moved to dismiss that motion without prejudice as untimely, because the defendant's judgment of conviction had not yet become final. The defendant opposed the government's motion, but this Court never ruled on it. The defendant has filed his amended § 2255 motion contemporaneously with this memorandum in support.

II. Statement of Facts

The trial record demonstrates that this Court erroneously excluded otherwise admissible evidence which was relevant to the theory of the defense. The appellate record demonstrates that the defendant's counsel on appeal failed to challenge that critical error in favor of less meritorious issues. These facts support all three grounds for relief raised in the amended motion. Ground Three of the amended motion is also supported by the record of the court's oral pronouncement of sentence, which shows that this Court imposed a complex sentence which adds up to 115 months' imprisonment, whereas the judgment of conviction, as well as the amended judgment, impose a sentence of 150 months' imprisonment.

A. The defense at trial.

Irwin Schiff's defense at trial was that he had a good-faith belief that he was acting in accordance with the law, and therefore lacked the "willfulness" required for conviction. See *Cheek v. United States,* 498 U.S. 192 (1991). Mr. Schiff sought to instill reasonable doubt in the jury in two ways.

1. Psychiatric testimony.

Irwin Schiff first sought to undercut the prosecution's argument that he could not hold his beliefs in good faith since courts had previously informed him that they were erroneous. He attempted to do this by proffering psychiatric testimony that he suffers from bipolar disorder, a mood disorder which causes him to hold firmly to his beliefs, regardless of what any court or governmental agency has told him, and despite the consequences he and

others have suffered for acting on those beliefs. *See* Hayes Report 7-8 (Attached as an exhibit to "Defendant's Response to the Government's Motion for a Second *Farretta* Inquiry & Cross Motion for Dismissal of All Charges, Since the Government Cannot Prove 'Willfulness' based on the Report of its Own Expert").

On September 7, 2004, Mr. Schiff filed a notice pursuant to Fed.R.Crim.P. 12.2 that he intended to call witnesses at trial to testify concerning his bipolar disorder. On May 26, 2005, defendant Schiff filed "Defendant's Response to the Government's Motion for a Second *Farretta* Inquiry & Cross Motion for Dismissal of All Charges, Since the Government Cannot Prove 'Willfulness' based on the Report of its Own Expert." In that *pro se* response, defendant Schiff put the government on notice that he intended to call Daniel S. Hayes, Ph.D., a clinical psychologist who had examined Mr. Schiff at the government's request, to testify concerning his bipolar disorder. On July 12, 2005, the government filed a motion *in limine* in which it asked the Court "to preclude defendant Schiff from presenting at trial the mental health defense that he suffered from bipolar disorder and defendant Cohen from presenting at trial the mental health defense that he suffered from narcissistic personality disorder." (Dkt. No. 162). On September 9, 2005, the Court granted the government's motion. (Dkt. No. 225).

2. Evidence the Irwin Schiff holds his beliefs in good faith.

The second way the defendant attempted to demonstrate to the jury his good-faith belief that he had not violated the law or encouraged others to do so,

was through testimony, tapes, and other exhibits which either would have shown the jury why Mr. Schiff believes what he does about tax law or supported his claim that he sincerely holds those beliefs.

One of the ways the defendant tried to instill a reasonable doubt concerning the "willfulness" prong of the offenses with which he was charged was to offer in evidence tapes of seminars he taught concerning what he believed the tax law to require. This evidence was explicitly proffered to counter the government's evidence concerning "willfulness," and not to persuade the jury of his view of the law. He did not seek by this evidence to counter or contradict the Court's instructions to the jury as to what the tax law actually requires. This Court nevertheless excluded the defendant's evidence on the ground that to play the tapes would usurp this Court's role of instructing the jury on the law. One colloquy between Mr. Schiff and the Court on this issue is as follows:

> MR. SCHIFF: —well, I address the relevancy of the tape? They are able to send undercover agents to the seminar because they believed that some criminal activity is going to be discussed. The fact is that the tape will show that no criminal activity was discussed. That's the relevancy. And, according to this case I just gave you, I have to be given wide latitude when willfulness is at issue.
>
> The fact is this is proof that in the two-day seminar or the one-day seminar I don't advocate violations of law. And I think it's very relevant. The whole case is based on that tape.
>
> THE COURT: No, it isn't.
>
> MR. SCHIFF: So I believe it ought to be played, either the two-day seminar or the one-day seminar.

> THE COURT: Okay. It's not coming in. It's irrelevant. It's – it cites misstatements of law, false law. It – it usurps the power of the Court to instruct the jury on the law. And so it's not coming in, neither one.

Tr. 3664. See also Tr. 4217, 4426-29 (Court excludes "Secrets to Living an Income Tax Free Life," a videotaped seminar given by Mr. Schiff which he tried to introduce into evidence as relevant to the "willfulness" issue). Later, the defendant tried to demonstrate his good faith by asking a witness who had attended one of his seminars whether he (Mr. Schiff) had ever done or said anything that caused the witness to doubt that he (Mr. Schiff) actually believed what he taught. Tr. 4243. Although this evidence was relevant to the question of Mr. Schiff's willfulness, this Court excluded it. *Id.* The Court also refused to allow another witness to testify that she believes that Mr. Schiff sincerely holds his asserted beliefs concerning tax law, Tr. 4998-5000, even though this evidence was also relevant to the question of Mr. Schiff's willfulness. This Court explained its exclusion of this testimony by remarking that the witness' "opinion as to your honesty takes away from the jury." Tr. 5000.

In response to the prosecution allegation that Mr. Schiff maintained offshore accounts to defeat payment, as charged in Count 17, the defendant claimed at trial that he maintained offshore accounts to prevent the IRS from illegally levying his bank accounts. When he attempted to explain during his own testimony why he believed IRS bank levies to be illegal, this Court excluded that testimony, even though it was relevant to the question of Mr. Schiff's willfulness. Tr. 4968. The Court also refused to allow the defendant to present the testimony of Robert Eilers, and Robert Schulz, whose experience

with the IRS led Mr. Schiff to believe that he had to maintain offshore accounts to prevent the IRS from carrying out what he believed would have been an illegal seizure of his assets.

Robert Eilers' experience with the IRS led Mr. Schiff to believe that the law did not require banks to honor IRS levies without a court order, because even though Mr. Eilers refused to comply with an IRS levy, the IRS never forced him to turn over money he owed to Mr. Schiff. Tr. 4349-54. This Court refused to allow that testimony, on the basis that what Mr. Schiff claims to have learned from this experience was "false logic." Tr. 4352-53. While this testimony may not have convinced the Court that Mr. Schiff held his beliefs in good faith, the Court was not the finder of fact at the trial. Since this evidence was relevant to Mr. Schiff's good faith defense, it was error for the Court to exclude it. See *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991).

Robert Schulz's experience with the IRS led Mr. Schiff to believe that neither he nor any bank need comply with IRS summonses or levies unless they are backed by a court order, because Mr. Schulz was party to a case in which the United States Court of Appeals for the Second Circuit held that "IRS summonses apply no force to taxpayers and no consequences whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order." Tr. 4413. See *Schulz v. I.R.S.*, 413 F.3d 297 (2d Cir. 2005) (disobedience to an Internal Revenue Service summons has no penal consequences until a judge has ordered its enforcement). Although this testimony was relevant to the

question of Mr. Schiff's willfulness, the Court erroneously restricted Schulz's testimony to Mr. Schiff's character. Tr. 4547-48.

The defendant also attempted to instill a reasonable doubt with respect to "willfulness" by offering into evidence *The Great Income Tax Hoax,* a book authored by Mr. Schiff. This book was relevant to the jury's consideration of Mr. Schiff's "willfulness," because in it he explained and supported the seriousness, and thus the genuineness, of his beliefs (regardless of their accuracy) concerning the income tax laws. The book was therefore relevant to whether Mr. Schiff held his professed beliefs in good faith.

The defendant also attempted to instill a reasonable doubt with respect to "willfulness" by attempting to testify that accountants and attorneys had told him that his views on tax law were correct. *See* Tr. 4663 (excluding such evidence on relevance and hearsay grounds, even though the statements were not being offered for the truth of their content, and were relevant to "willfulness" in that they supported Mr. Schiff's claim that he committed the acts charged in the indictment in good faith). *See also* Tr. 4998 (excluding proffered testimony of attorney Noel Spaid, who confirmed for Mr. Schiff the accuracy of his claim that a "notice of levy" is not itself a "levy").

At trial, the prosecution used Mr. Schiff's prior tax conviction in the District of Connecticut to argue that Mr. Schiff had received notice that he is required to pay taxes. Tr. 4957. To support his claim that he continued to hold his beliefs concerning the tax law in good faith even after that conviction was upheld on appeal, the defendant attempted to offer into evidence an article

from the *Journal of Taxation* which disagreed with the Second Circuit's interpretation of the law which led it to affirm Mr. Schiff's conviction. Tr. 4955-57. Because Mr. Schiff relied on this article to support his continued belief that none of his actions violated the law, it was relevant to the question of willfulness. This Court nevertheless excluded it from evidence. *Id.*

When Mr. Schiff attempted to testify concerning why he believed he was not required to pay income tax, this Court sustained the prosecution's objections, even though that testimony was relevant to the question of his willfulness. Tr. 4515-17. This Court also erroneously excluded testimony of witnesses on whom Mr. Schiff relied for his belief that his views on tax law are correct. Those witnesses include Robert Wellesley, whose study of IRS collection due process hearings concluded that the IRS does not comply with the law, Tr. 4419-21, and John Turner, a former Revenue Officer with the IRS. Tr. 4416, 4593-96 (restricting Turner to character testimony).

At trial, Mr. Schiff testified that he did not believe the IRS had the authority to estimate an individual's taxes, because he believed the Internal Revenue Code gives that authority to the Secretary of the Treasury, not to the IRS, Tr. 4963, and because Mr. Schiff believed that the Secretary of the Treasury never delegated that authority to the IRS. *Id.* Although this Court permitted Mr. Schiff to testify that he had these beliefs, it did not permit him to explain why he believed the law supported them. Tr. 4642. Nor did this Court allow the defendant to read to the jury from the statute which delegates authority to the Secretary of the Treasury, rather than to the IRS, Tr. 4964-66,

or to introduce into evidence a letter he received from the publisher of the Federal Register which would have shown the jury why he believed that that authority had not been delegated to the IRS. Tr. 4966-67.

Finally, at trial Mr. Schiff testified that he derived some of his beliefs concerning the tax laws from two Supreme Court cases: *Merchant's Loan & Trust Co. v. Smietanka,* 255 U.S. 509 (1921), and *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895). While this Court permitted Mr. Schiff to testify that some of his beliefs concerning the income tax laws rest on his interpretation of these cases, Tr. 4539-41, 4562 (*Merchant's Loan*), this Court did not permit him to introduce the Supreme Court's opinions in these cases into evidence. Tr. 498-500, 5023. Had the jury been permitted to read these opinions, it could have assessed for itself whether they arguably supported Mr. Schiff's stated beliefs. If so, then the jury would have been more inclined to believe his assertions were sincere. The cases were therefore relevant to whether Mr. Schiff held his beliefs in good faith.

B. Sentencing and Judgment

Although the Court announced at sentencing that it was imposing a sentence of 151 months, the court's oral pronouncement of the sentence on particular counts adds up to 115 months, not 151 months:

> [T]he Court sentences the defendant to the Bureau of Prisons for the term of 151 months with the sentences to be derived as follows:

> 60 months per count for Counts 1 through 17 to run concurrently;[3] 36 months for Count 2 to run consecutively to Counts 1 and 17 for a total of 96 months; 36 months to run concurrently -- or consecutively to Counts 1 through 17 and 2; and 19 months as to Counts -- 36 months as to Counts 4 through 6 and 18 through 23, 19 of which will run consecutively and the remainder to run concurrently.
>
> In addition, 12 months for contempt of court to run consecutive to the 151 months' total that has been imposed for the counts of conviction.

Sent Tr. 55-56. The Court also ordered $4,265,249.78 in "restitution." Sent. Tr. 56, and $1,300 in special assessments, representing 13 counts at $100 each. *Id.* 58.

The pertinent portion of the Court's judgment reads:

> 151 months as to the charges (60 months as to Counts 1 and 7, concurrent; 36 months as to Count 2, to be served consecutively to the sentence imposed as to Counts 1 and 7; 36 months as to counts 4 though 6, of which 19 months are to be served consecutively to the sentence imposed as to Counts 1, 2 and 17 and 17 months to be served concurrently with the sentences imposed in Counts 1, 2 and 17) and 12 months for the Contempt of Court citations, to be served consecutively to the sentence imposed in Counts 1-5 and 17 through 23.

This is why the sentences this Court actually imposed on individual counts add up to 115 months: (1) Counts 1 and 17: 60 months (the judgment's two references to "Count 7" are clearly typographical errors for "Count 17"); (2) Count 2: 36 months to run consecutively to Counts 1 and 17; and (3) Counts 4-6 and 18-23 (36 months, 19 of which run consecutively to 1, 2, and 17). The total is thus 60 + 36 + 19 = 115 months. No term of imprisonment was imposed on

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[3] By "1 through 17" the court clearly meant "1 and 17." Only Counts 1 and 17 had statutory maximums of 60 months. The statutory maximum for each of the other counts (2-6 and 18-23) was 36 months.

Count 3. The only sentence imposed on that count was a $100 special assessment.

The amended judgment filed on September 8, 2008, does not reflect the oral pronouncement of sentence as it was imposed on February 24, 2006, in that it imposes a 36-month term of imprisonment on Count 3. This clerical error, even if it reflected the Court's intention, would not change the total sentence, since the amended judgment provides that 17 of the 36 months on Count 3 are to run concurrently with the terms of imprisonment imposed on Count 1, 2, and 17; and 19 months are to run consecutively to the terms of imprisonment imposed on those counts. In other words, the sentence is to be the sum of 60 +36 + 19, which equals 115 months, *not* 151 months.

C. The Direct Appeal,

Mr. Schiff's counsel raised six issues on direct appeal: 1. Was Mr. Schiff's waiver of counsel at trial knowing and intelligent? 2. Did the contempt citations violate Due Process and Fed.R.Crim.P. 42? 3. Was the sentence reasonable? 4. Did this Court err in failing to recuse himself after determining that Mr. Schiff had "fomented threats to the safety of the Court"? 5. Were the "0" returns Mr. Schiff filed false or frivolous? and 6. Does the cumulative effect of trial errors warrant reversal?

III. Argument

A. Irwin Schiff Received Ineffective Assistance of Counsel on Direct Appeal.

Irwin Schiff received ineffective assistance of counsel on direct appeal, because his attorney failed to challenge this Court's erroneous exclusion of evidence relevant to his defense at trial. Ineffective assistance of appellate counsel claims are judged under the standards set by the Supreme Court in *Strickland v. Washington,* 466 U.S. 667 (1984). See *Smith v. Robbins,* 528 U.S. 259, 285 (2000) (applying *Strickland* to claim of ineffective assistance of appellate counsel); and *Delgado v. Lewis,* 223 F.3d 976 (9th Cir. 2000) (same).

In applying the *Strickland* standard to a claim of ineffective assistance of counsel on appeal, the Court must first determine whether counsel's representation was "objectively unreasonable." *Smith v. Robbins,* 528 U.S. at 285. The *Strickland* Court more fully articulated the performance element as requiring proof that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, and was unreasonable "under prevailing professional norms." *Id.* In *Robbins,* the Supreme Court looked to appellate counsel's selection of issues as the starting point for evaluating the performance prong of the *Strickland* test as applied to a direct appeal. 528 U.S. at 285. Where appellate counsel files a merits brief, as he did in this case, he does not have to raise every non-frivolous issue, *Jones v. Barnes,* 463 U.S. 745, 754 (1983), since "the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Miller v. Keeney,* 882 F.2d 1428, 1434 (9th Cir. 1989). Where, however, appellate counsel raised weak issues

while omitting stronger ones, the first part of the *Strickland* test is satisfied. See *Broyles v. Lewis,* 66 F.3d 334, 1995 WL 520047 * (9th Cir. 1995) (unpublished opinion) (citing *Gray v. Greer,* 800 F. 2d 644, 646 (7th Cir. 1985).

The second part of the *Strickland* test requires a showing that the defendant was prejudiced by his attorney's deficient performance. To demonstrate prejudice, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

The defendant satisfies both parts of the *Strickland/Robbins* test. With respect to the performance prong, only one of the six issues raised by appellate counsel was strong enough to warrant consideration by the Court of Appeals in its published opinion. See *United States v. Cohen,* 510 F.3d 1114 (9th Cir. 2007). The Court disposed of each of the other five issues in five paragraphs (one paragraph for each issue) of the unpublished memorandum opinion. *United States v. Cohen,* 262 Fed.Appx. 14 (9th Cir. 2007). The two issues which the defendant's amended motion claim appellate counsel should have raised were clearly stronger than the ones addressed in the unpublished opinion.

The first issue which the amended motion asserts appellate counsel should have raised – that this Court committed reversible error when it granted the government's *in limine* motion to exclude psychiatric testimony concerning Mr. Schiff's bipolar disorder – was precisely the same issue raised by Mr. Schiff's co-defendant, Lawrence Cohen, and addressed by the Court of Appeals

in its precedential opinion. See *United States v. Cohen*, 510 F.3d at 1123-27. Because the Court of Appeals reversed the conviction of Mr. Schiff's co-defendant based on this issue, it was clearly stronger than any issue raised by Mr. Schiff's counsel.

The second issue which the amended motion asserts appellate counsel should have raised was that this Court committed reversible error when it excluded testimony relevant to the theory of the defense, to wit: that Irwin Schiff did not willfully violate tax laws as charged in the indictment, because he had a good-faith belief that he was acting in accordance with the law. This issue was also stronger than an issue raised by Mr. Schiff's counsel. It was stronger than the issue challenging the contempt citations, because it would have resulted in a new trial, not simply an order requiring the district court to file the contempt orders required by Fed.R.Crim.P. 42(b) and to reduce the defendant's term of imprisonment on the contempt order by one month (based on a mathematical error). This issue was also stronger than the other five issues raised by appellate counsel. For the reasons explained in the Ninth Circuit's unpublished disposition, none of those issues was supported by law or the record. In contrast, controlling Ninth Circuit precedent precluded this Court from excluding evidence relevant to what Mr. Schiff thought the law was:

> Although a district court may exclude evidence of what the law *is* or *should be, see United States v. Poschwatta,* 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied,* 484 U.S. 1064 (1988), it ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant *thought the law was* ... because willfulness is an element of the offense.

United States v. Powell, 955 F.2d 1206, 1214 (9th Cir. 1991). Moreover, for the reasons discussed above, pp. 6-12, this Court's exclusion of such evidence was pervasive.[4]

The defendant also meets the prejudice prong of the *Strickland* test. It is clear that there is a reasonable probability that the result of the appeal would have been different with respect to the psychiatric testimony issue, since the Court of Appeals reversed the conviction of Mr. Schiff's co-defendant based on the same issue this motion claims Mr. Schiff's appellate counsel should have raised. There is also a reasonable probability that the Court of Appeals would have reversed Mr. Schiff's conviction based on the second issue as well, since controlling precedent requires that reversal. See *United States v. Powell*, 955 F.2d at 1214.

For these reasons, this Court should enter an order under Fed.R. § 2255 Proc. 4(b) requiring the filing of an answer, and after full consideration should grant Mr. Schiff's motion to vacate, vacate his conviction and sentence and allow him a new trial.

B. Irwin Schiff's 151-Month Sentence Is Either Illegal or the Result of Clerical Error; Appellate Counsel Was Ineffective for Failing to Raise this Issue on Appeal.

Should this Court reject the first two asserted grounds for relief, it should nevertheless file a second amended judgment which correctly reflects the sentence actually imposed. Although the judge announced at sentencing that it was imposing a sentence of 151 months, for the reasons previously

[4] The failure appellate counsel to raise the sentencing issue included in the amended § 2255 motion is address in Part B below.

discussed, pp. 12-14, the court's oral pronouncement of the sentence on particular counts adds up to 115 months, not 151 months. Since the judgment, which imposes a sentence of 151 months, is inconsistent with the oral pronouncement of sentence, it is not a legal sentence and must be corrected. *United States v. Hicks,* 997 F.2d 594, 597 (9th Cir. 1993) (remanding for correction of sentence, because "The only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant.") (internal citation omitted). Since this issue could and should also have been raised on appeal, appellate counsel's failure to raise it also deprived Irwin Schiff of his Sixth Amendment right to the effective assistance of counsel on appeal.

For these reasons, this Court should enter an order under Fed.R. § 2255 Proc. 4(b) requiring the filing of an answer. Should this Court reject the first two asserted grounds for relief and refuse to grant a new trial, it should therefore nevertheless file a second amended judgment which correctly reflects the sentence actually imposed. At minimum, this Court should vacate and then re-enter the judgment so as to allow the defendant the opportunity to raise the sentencing issue on direct appeal.

IV. Conclusion

For these reasons, the defendant-movant prays that this Court issue an order under Fed.R.Gov. § 2255 Proc. 4(b) directing the United States to answer this motion; and then, after such expansion of the record or hearing as may be appropriate, vacate the defendant's judgment of conviction and sentence and allow him a new trial, or grant other relief to which he may be entitled.

Respectfully submitted,

Date: October 31, 2011

s/Alan Ellis
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s/Al Lasso
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Attorneys for the Defendant-Movant

Certificate of Service

I certify that on October 31, 2011, I served a copy of the foregoing Memorandum in Support on all parties by electronically filing it with the Clerk of the District Court using its ECF System, which electronically notifies them.

s/Alan Ellis
Alan Ellis