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40.00 *TAX PROTESTORS*

40.01 *GENERALLY*

Tax protestors have developed numerous schemes to evade their income taxes and frustrate the Internal Revenue Service under the guise of constitutional and other objections to the tax laws. These schemes range from a simple failure to file to use of warehouse banks to conceal financial transactions and harassment of government officials through Form 1099 schemes. These schemes give rise to charges under all the criminal tax statutes.[1] Thus, this section should be read in conjunction with those sections of the ***Manual*** treating the various substantive offenses in detail. *See* Sections 8.00 through 29.00, *supra*.

40.02 *FAILURE TO FILE -- 26 U.S.C. § 7203*

40.02[1] ***Generally***

The most common method used by tax protestors is to simply not file a return, or to file a return that reports no financial information and may espouse tax protest rhetoric. Generally, withholding of income taxes by employers is also prevented. *See* Section 10.00, *supra*.

40.02[2] ***What Constitutes a Return***

A Form 1040 must contain information relating to the taxpayer's income from which a tax can be computed to satisfy the requirements of the Internal Revenue Code. ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970); ***United States v. Daly***, 481 F.2d 28, 29 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973). The Forms 1040 filed in ***Porth*** and ***Daly*** contained only the taxpayers' names and addresses, and references to various constitutional provisions which assertedly excused them from filing tax returns.

Failure to file convictions in both cases were upheld, with the court in ***Porth*** saying:

> The return filed was completely devoid of information concerning his income as required by the regulations of the IRS. A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.

Porth, 426 F.2d at 523 (citations omitted). *See also* ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982) (Form 1040 reflected only the amount withheld from earnings and no other dollar figure, with refund claimed); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984); ***United***

States v. Kimball, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*) (asterisks and no signature not a return); ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983) ("the test is whether the defendants' returns themselves furnished the required information for the IRS to make the computation and assessment, not whether the information was available elsewhere"); ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984).

Forms 1040 which report only zeroes are not valid returns. ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980); ***Mosel***, 738 F.2d 157; ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) ("when apparent that the defendant is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return"); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980). *But* ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980) (zeros on Long's tax forms, unlike blanks, constituted information as to income from which a tax could be computed just as if the return had contained other numbers).

Similarly, courts have held that tax forms reporting nothing or small amounts in the blanks provided for income and expenses do not constitute legal returns within the meaning of the Internal Revenue Code. ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979) (total income figure based on his interpretation of "constitutional dollars" and a blanket claim of the Fifth Amendment as to all other items); ***United States v. Kimball***, 896 F.2d 1218 (9th Cir. 1990), *vacated*, 925 F.2d 356 (9th Cir. 1991) (*en banc*) (conviction upheld where returns only reported asterisks); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir.), *cert. denied*, 479 U.S. 954 (1986) (Form 1040 with word "object" written in all spaces requesting information is not a return); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979) ("unknown" or claimed "Fifth Amendment" responses on Forms 1040 are not returns).

A Form 1040 that shows only a bottom line figure for taxable income with no information as to how the reported taxable income was derived (such as the source of the income, the amount of gross income and deductions, and the number of exemptions claimed) is not a valid income tax return, as a matter of law. ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984). The rule is one of reason; thus, the ***Grabinski*** court stated:

> On the other hand, omission of isolated information not seriously hampering the IRS's ability to check a taxpayer's asserted tax liability -- for example, the omission of a taxpayer's social security number or the nondisclosure of the names of one's dependent children -- does not invalidate a return under section 7203.

Grabinski, 727 F.2d at 686. Compare ***Grabinski*** with ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980), in which defendant filed Forms 1040 which were blank except for the defendant's signature and request for refund of income tax withheld and attached a Form W-2. The Ninth Circuit held that the Form 1040 with attached W-2s constituted returns because they provided "the IRS with ostensibly complete information from which a tax

could be computed" and upheld the defendant's conviction under section 7206(1) for filing false returns. ***Crowhurst***, 629 F.2d at 1300.

40.02[3] ***Return or Not -- Matter of Law***

The determination of "whether a return is valid for section 7203 purposes is a question of law for the court to decide." ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984); *see* ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 834 (7th Cir. 1980) (unsigned Form 1040 not a return as a matter of law); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986). The Eighth Circuit noted in ***Grabinski*** that such a ruling "in no way removes from the jury fact questions regarding whether a defendant was required to file a return, . . . actually failed to make a return, . . . and whether a failure to file was willful." ***Grabinski***, 727 F.2d at 686; *see also* ***Green***, 757 F.2d at 121.

However, some courts have cautioned that such a ruling may improperly invade the province of the jury. The Sixth Circuit has held that the trial court should only "properly stat[e] the law respecting the definition of a return, and [leave] it to the jury to decide whether [the] defendant had properly filed a return." ***United States v. Saussy***, 802 F.2d 849, 854 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987). The Sixth Circuit held in ***Saussy*** that the following jury instructions were proper:

> A document which does not contain sufficient information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code and the Regulations thereunder. Whether any document submitted by the defendant constitutes tax returns is a matter for the jury to decide.

Saussy, 801 F.2d at 502.

Similarly, in ***United States v. Goetz***, 746 F.2d 705 (11th Cir. 1984), the Eleventh Circuit held that the trial court improperly invaded the province of the jury by "determin[ing] that the documents filed by the defendants did not contain any financial information, and conclud[ed] that, as a matter of law, these documents were not returns". ***Goetz***, 746 F.2d at 708.

40.03 *FRAUDULENT EMPLOYEE'S WITHHOLDING ALLOWANCE CERTIFICATE -- 26 U.S.C. § 7205*

40.03[1] *Generally*

Supplying an employer with a false or fraudulent employee withholding allowance certificate, Form W-4, is an offense under 26 U.S.C. § 7205. [2] *See* Section 11.00, *supra*. When a protestor files a false withholding allowance certificate, either claiming an excess number of withholding allowances or claiming to be exempt from taxation, the protestor often subsequently fails to file an income tax return. If so, prosecution may be pursued under 26 U.S.C. § 7205, for the filing of the fraudulent Form W-4, and 26 U.S.C. § 7203, for failing to file a return, both of which are misdemeanors. Because prosecution generally should proceed under the most serious readily provable offense, if the government is able to prove a substantial tax deficiency, charges should be brought under 26 U.S.C. § 7201 (***Spies*** evasion) for the felony of attempted evasion of income taxes. The filing of the false Form W-4 could be used as the affirmative act of attempted evasion. In this connection, *see* Section 40.04, *infra*.

Willfulness in a section 7205 prosecution may be proven by circumstantial evidence. *See* ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979). The filing of protest returns for the years in issue is evidence of willfulness. *See* ***United States v. Anderson***, 577 F.2d 258, 261 (5th Cir. 1978); ***United States v. Foster***, 789 F.2d 457, 461 (7th Cir. 1986), *cert. denied*,, 479 U.S. 883 (1986). The defendant's prior history of filing proper returns followed by a failure to file and protest activities is also circumstantial evidence of willfulness. ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984).

40.03[2] *Employee's Withholding Allowance Certificate, Form W-4*

The Form W-4 that must be filed with an employer and the Internal Revenue Code provisions requiring the filing of a Form W-4 use different terminology. The Form W-4 itself carries the title "Employee's Withholding Allowance Certificate" and the form and instructions speak in terms of allowances. The Internal Revenue Code, however, speaks in terms of withholding "exemptions" and refers to the required form as a "Withholding Exemption Certificate." *See, e.g.*, 26 U.S.C. §§ 3402(a)(2), (b), & (f). There is no real difference, however, arising out of the use of the term "allowances" in the Form W-4 and the term "exemptions" in the Code. Thus, the regulations provide that "Form W-4 is the form prescribed for the withholding exemption certificate required to be filed . . . [and it] shall be prepared in accordance with the instructions and regulations applicable thereto." Treas. Reg. § 31.3402(f) (5)-(1) (26 C.F.R.). The form that must be filed (a Form W-4) is the same whether it is termed a withholding exemption certificate or a withholding allowance certificate. The Fifth Circuit has addressed this issue at least twice. In ***United States v. Anderson***, 577 F.2d 258, 261 (5th Cir. 1978), the court held that the "meaning of exemption and allowance overlap sufficiently in this context to apprise the Andersons of the offense", in response to a sufficiency-of-the-indictment challenge by defendants who had been charged with "wrongfully claiming withholding exemptions." In ***United States v. Benson***, 592 F.2d 257, 258 (5th Cir. 1979), the trial court referred to Forms W-4 as withholding allowance certificates and the court of appeals called this a "simple misnomer," not prejudicial to any substantial rights of the defendant.

The Tax Division's policy is to use the term "Employee's Withholding Allowance Certificate, Form W-4" in all relevant indictments and informations. This conforms the charge and proof to the actual document alleged to be false. *See* ***United States v. Copeland***, 786 F.2d 768, 769 (7th Cir. 1986) (charging the filing of "a false withholding certificate"). *See also* ***United States v. Foster***, 789 F.2d 457, 458 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986) ("one count of willfully filing a false employee's withholding allowance certificate, in violation of 26 U.S.C. Section 7205").

40.04 *SPIES EVASION -- 26 U.S.C. § 7201*

40.04[1] *Spies Evasion Via Filing False Form W-4*

An essential element of the crime of attempted evasion of income tax is an attempt "in any manner" to evade or defeat taxes. 26 U.S.C. § 7201. The Supreme Court, in ***Spies v. United States***, 317 U.S. 492, 499 (1943), held that section 7201 requires a "willful commission" rather than a mere "willful omission". Thus, to be subject to prosecution for attempted evasion of income tax, an individual must commit an affirmative act in an attempt to evade taxes. This affirmative act may be "any conduct, the likely effect of which would be to mislead or to conceal." ***Spies***, 317 U.S. at 499. *See also* Section 8.04, *supra*.

In traditional tax prosecutions, the "affirmative act" element is usually established through the filing of a false or fraudulent income tax return. Protestor prosecutions, however, are generally so-called ***Spies*** evasion cases because protestors usually do not file tax returns. Willfully failing to

file a return, coupled with an affirmative act of evasion "the likely effect of which would be to mislead or conceal" establishes a ***Spies*** evasion case. ***Spies***, 317 U.S. at 499. Thus, the government will have to prove that the defendant committed some affirmative act of evasion other than the filing of a false return. [3]

Affirmative acts common to protestor prosecutions include the filing of false Forms W-4, the filing of protest documents deemed not to be valid returns or deemed to be valid but false returns, the transfer of assets to spouses, relatives, or third parties to conceal ownership of such assets from the Internal Revenue Service, and substantial dealings in cash as a means of concealment. ***United States v. Waldeck***, 909 F.2d 555, 559-60 (1st Cir. 1990) (filing of Fifth Amendment returns and false Forms W-4 evidence of willfulness); ***United States v. McKee***, 942 F.2d 477, 478 (8th Cir. 1991) (filing false Forms W-4 and documents containing false social security numbers evidence of willfulness).

The filing of false Forms W-4 may be the sole affirmative acts of evasion. *See* ***United States v. DiPetto***, 936 F.2d 96, 97 (2d Cir.), *cert. denied*, 112 S. Ct. 193 (1991) (filing and maintaining false Forms W-4 satisfied affirmative act requirement of ***Spies***); ***United States v. Davenport***, 824 F.2d 1511, 1519 (7th Cir. 1987); ***United States v. Foster***, 789 F.2d 457, 461 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986) (conviction for ***Spies*** evasion, based on failing to file income tax returns and filing a false Form W-4, upheld); ***United States v. Copeland***, 786 F.2d 768, 770 (7th Cir. 1986) ("The act of filing a false and fraudulent tax withholding certificate, although a misdemeanor offense, constitutes valid and sufficient evidence of willful commission").

The false Form W-4 need not have been submitted during the year for which evasion is charged:

> Where a taxpayer has willfully failed to file a tax return in violation of Section 7203, a prior, concomitant or subsequent false statement may elevate the Section 7203 misdemeanor to the level of a Section 7201 felony.

Copeland, 768 F.2d at 770. For example, the defendant in ***Copeland*** filed false Forms W-4 on January 16, 1980, and on February 26, 1982, both of which were held willful attempts to evade his 1980 and 1981 taxes. ***Copeland***, 768 F.2d at 770.

Maintaining false Forms W-4 on file year after year may provide an affirmative act of evasion in subsequent years as well as in the year in which the taxpayer first filed a fraudulent Form W-4. ***United States v. Williams***, 928 F.2d 145, 148-49 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991). The act of "maintaining" a false W-4 constitutes an act "the likely effect of which [is] to mislead or conceal." ***Williams***, 928 F.2d at 149.

In failure to file/false W-4 cases, the Tax Division determines whether to bring misdemeanor (sections 7203 and 7205) or felony charges (section 7201) based on the totality of the circumstances of the case. Circumstances to consider include the egregiousness of the individual's tax protest actions, whether the individual is a leader or simply a follower, the extent of the tax protest problem in the jurisdiction, and the favorableness or unfavorableness of the relevant case

law in the jurisdiction where there is venue.

40.04[2] ***Section 7201 Indictments Not Duplicitous***

Indictments charging ***Spies*** evasion have been upheld against claims that they are duplicitous because they charge in a single count both evasion of assessment of tax and evasion of payment of tax. *See* ***United States v. Huguenin***, 950 F.2d 23, 26 (1st Cir. 1991); ***United States v. Waldeck***, 909 F.2d 555, 558 (1st Cir. 1990) ("nothing in text or history of § 7201 requires an indictment to treat § 7201 as if it were two sections of the United States Code"); ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990), *appeal after remand*, 948 F.2d 923 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992); ***United States v. Becker***, 965 F.2d 383, 386 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993) ("section 7201 creates only one crime, tax evasion") (citing ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990)); ***United States v. Mal***, 942 F.2d 682-87 (9th Cir. 1991) (statute defines a single crime and it is proper to charge different means of committing crime in a single count of indictment). *See* Section 8.00 Tax Evasion, *supra*.

40.04[3] ***Statute of Limitations Considerations***

In a ***Spies*** evasion case, the statute of limitations is six years. 26 U.S.C. § 6531(2). The statute of limitations does not begin to run until the defendant has committed an affirmative act *and* incurred a tax deficiency. Therefore, in cases in which an affirmative act is committed prior to the due date of the return, the statute of limitations begins to run on the due date of the return. ***United States v. DiPetto***, 936 F.2d 96, 98 (2d Cir. 1991); ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); ***United States v. Payne***, 978 F.2d 1177, 1178-80 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993) (citing ***Toussie v. United States***, 397 U.S. 112, 115 (1970)). Similarly, affirmative acts committed after the due date of the return extend the statute of limitations. ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987); ***United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987); and cases cited above.

40.05 ***SUBSCRIBING TO A FALSE RETURN -- 26 U.S.C. § 7206(1)***

False return charges, unlike evasion charges, do not require proof of a tax deficiency. The government may choose to prosecute a tax protestor under section 7206(1), rather than section 7201, when, for example, the evidence does not establish a substantial tax deficiency beyond a reasonable doubt, but the protestor's actions warrant a felony prosecution. Such a situation may exist in the charitable contribution, fifty percent deduction cases discussed in Section 40.08, *infra*. For a discussion of section 7206(1), *see* Section 12.00, *supra*.

40.06 *FALSE STATEMENT OR DOCUMENT -- 18 U.S.C. § 1001*

A violation of 18 U.S.C. § 1001 can be an appropriate substitute charge for 26 U.S.C. § 7206(1) when the false document in question lacks the required signature or the document is not made under penalties of perjury. A common scenario for such an application of section 1001 is where the protestor files an unsigned income tax return. Section 1001 also can be used when the individual has lied to the agents during the investigation. For a discussion of section 1001, *see* Section 24.00, *supra*.

40.07 *AIDING AND ASSISTING PREPARATION OF FALSE RETURNS -- 26 U.S.C. § 7206(2)*

Tax protestors who cause third parties to prepare and file false returns may be charged under 26 U.S.C. § 7206(2). *See* ***United States v. Holecek***, 739 F.2d 331 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985) (return preparation); ***United States v. Kellogg***, 955 F.2d 1244, 1249 (9th Cir. 1992) (defendant assisted in preparation of returns filed by others); ***United States v. Condo***, 741 F.2d 238, 240 (9th Cir. 1984), *cert. denied*, 469 U.S. 1164 (1985) (preparation and mailing of false Forms W-4); ***United States v. Erickson***, 676 F.2d 408 (10th Cir.), *cert. denied*, 459 U.S. 853 (1982).

Providing advice and material to taxpayers, who in turn file false returns, is sufficient to sustain a section 7206(2) conviction. *See* ***United States v. Kelley***, 769 F.2d 215 (4th Cir. 1985). In ***Kelley***, the defendant argued that he could not be lawfully convicted of violating section 7206(2) because "he . . . did not actually participate in the preparation of any of the forms [Forms W-4] but only gave advice that his listeners were free to accept or reject." ***Kelley***, 769 F.2d at 217. Rejecting this argument, the court said:

> The contention ignores reality, for he did participate in the preparation of the forms. He told the listeners what to do and how to prepare the forms. He did so with the intention that his advice be accepted, and the fact that the members paid him for the advice and promised assistance warranted an inference of an expectation that the advice would be followed. Moreover, he actually supplied forms and materials to be filed with W-4 forms. He did not take his pen in his hand to complete the forms, but his participation in their preparation was as real as if he had.

Kelley, 769 F.2d at 217.

40.08 *OMNIBUS CLAUSE PROSECUTION: SECTION 7212(a)*

Section 7212(a) provides that:

> [W]hoever . . . in any other way corruptly . . . endeavors to obstruct or impede, the due administration of this title shall be guilty of an offense against the United States. [4]

See Section 17, *supra*, for a discussion of section 7212(a) and Tax Division Directive 77, which sets forth the criteria for the statute's use. "Corrupt" endeavors to impede the administration of the tax laws are actions performed with the intent to secure an unlawful advantage or benefit either for oneself or another. ***United States v. Reeves (Reeves I)***, 752 F.2d 995, 998 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985); ***United States v. Popkin***, 943 F.2d 1535, 1540 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992).

Tax protest schemes are generally ripe for prosecution under section 7212. *See* ***United States v. Mitchell***, 985 F.2d 1275, 1278 (4th Cir. 1993) (defendant submitted false application for tax exempt status for his consulting business and concealed income as "charitable contributions"); ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, No. 93-5178 (U.S. Oct. 4, 1993) (Form 1099 scheme directed against federal officials and two private individuals involved in IRS collection action); ***United States v. Higgins***, 987 F.2d 543, 544 (8th Cir. 1993) (requesting rewards from IRS for debt "forgiven" to government employees); ***United States v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993) (Form 1099 scheme); ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992) (Form 1099 scheme attempted to retrieve property seized by IRS); ***United States v. Williams***, 644 F.2d 696, 700-01 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981) (false Form W-4 scheme); ***United States v. Kuball***, 976 F.2d 529 (9th Cir. 1992) (Form 1099 scheme and attempted tax refund); ***Popkin***, 943 F.2d at 1537 (attorney created corporation to disguise character of illegally earned income and repatriate it from foreign bank); ***United States v. Shriver***, 967 F.2d 572, 573-74 (11th Cir. 1992) (attempts to defeat IRS lien); ***United States v. Martin***, 747 F.2d 1404 (11th Cir. 1984) (defendant knowingly filed false complaint alleging agent misconduct during an audit).

40.09 ***CHURCH SCHEMES***

40.09[1] ***Generally***

Some protestors feign ordination in a church to receive tax exempt status. Many become ministers in mail order churches, like the Universal Life Church, the Basic Bible Church of America, or the Life Science Church. Most often, the officers and members of the congregation will be limited to the protestor and members of the protestor's immediate family. Using a church framework, the protestor usually adopts one of two schemes. Under the first, a vow of poverty is executed, ostensibly assigning all income and worldly possessions to the protestor's church. The protestor then contends that his or her income is the church's income and, therefore, not taxable to the minister. The protestor uses the funds, ostensibly assigned to the church, to pay personal and other expenses, just as the protestor had done before taking the sham vow of poverty. *See*, *e.g.*, ***United States v. Ebner***, 782 F.2d 1120 (2d Cir. 1986); ***United States v. Masat***, 948 F.2d 923 (5th Cir. 1991); ***United States v. Dube***, 820 F.2d 886 (7th Cir. 1987); ***United States v. Zimmerman***, 832 F.2d 454 (8th Cir. 1987).

A second scheme involves the protestor's making "charitable contributions" to a church, generally of 50 percent of the adjusted gross income of the protestor, which is the maximum amount that can be deducted as a charitable contribution under the Internal Revenue Code. 26 U.S.C. § 170(b). The protestor will deposit the "contribution" in a bank account he has opened in the name of the church. This charitable contribution is deducted on the protestor's individual return, reducing taxable income, even though the donated funds are thereafter used for personal purposes. *See* ***United States v. Heinemann***, 801 F.2d 86, 88 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

40.09[2] ***The Vow of Poverty Scheme***

A tax protest church is not organized and operated exclusively for religious purposes, with no personal inurement to any individual and, thus, it does not have a tax-exempt status. 26 U.S.C. § 501(c)(3), ***Exemption From Tax On Corporations, Certain Trusts, Etc.*** Generally, the government's proof takes the form of evidence showing that although the protestor signed a vow of poverty, the vow was not fulfilled in practice -- the protestor lived and carried out his or her economic and financial affairs the same as in the past. *See* ***United States v. Peister***, 631 F.2d 658 (10th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), upholding the conviction of Peister for filing a false "withholding exemption certificate form W-4". Peister formed a church with himself as minister and his wife and parents as its trustees, took a vow of poverty in form only, set up church checking accounts, and used the funds in those accounts for personal purposes. ***Peister***, 631 F.2d at 660. The court stated:

> In the instant case the record contains adequate evidence from which the jury could infer that Peister set up the church to avoid taxes. Viewed most favorably to the government, the evidence showed the

> church was a shell entity, fully controlled by Peister and his wife, or at the least by them together with Peister's parents. The vow of poverty was one in form only, and had no substantive effect on defendant's lifestyle. The use of the purchased forms to establish the church and the sequence of events all indicate a deliberate plan to manufacture a religious order exemption. The jury apparently chose to disbelieve Peister's testimony of his belief in the church, and that was within the jury's power as the fact finder.

Peister, 631 F.2d at 660.

The courts determine whether a member of a religious order earns income in an individual capacity or as an agent of the order by considering numerous factors, including: the degree of control exercised by the order over the member; ownership rights between the member and the order; the purposes or mission of the order; the type of work performed by the member vis-a-vis the purposes or mission; the dealings between the member and the third-party employer, including the circumstances surrounding job inquiries and interviews, and the control or supervision exercised by the employer; and, dealings between the employer and the order. ***Fogarty v. United States***, 780 F.2d 1005, 1012 (Fed. Cir. 1986) (Jesuit priest liable for taxes on the income earned as a university professor). *See also* ***Schuster v. C.I.R.***, 800 F.2d 672 (7th Cir. 1986).

40.09[3] ***The Charitable Contribution Scheme***

As previously stated, in this scheme, the protestor purports to donate to his or her church 50 percent of adjusted gross income, which is the maximum allowable amount for a charitable contribution deduction. 26 U.S.C. §§ 170(a)(i) & 170(b)(1)(A) & (E). The donated funds are then used by the protestor for personal purposes. *See* ***United States v. Michaud***, 860 F.2d 495 (1st Cir. 1988). In these cases, the government must prove that either no contribution or gift to the church was made or that it was not made to a qualified church under 26 U.S.C. § 170(c)(2) which requires that "no part of the net earnings of which inures to the benefit of any private shareholder or individual."

There is no gift or contribution where there is no total relinquishment of dominion and control over property and funds allegedly given to the "church". *See* ***Stephenson v. C.I.R.***, 748 F.2d 331 (6th Cir. 1984); ***MacKlem v. United States***, 757 F. Supp. 6 (D.Conn. 1991); ***Gookin v. United States***, 707 F. Supp. 1156 (N.D. Cal. 1988). If gifts are made with the incentive of anticipated benefit of an economic nature, then no deduction is available even if the payment is made to a tax-exempt organization. *See* ***DeJong v. C.I.R.***, 309 F.2d 373 (9th Cir. 1962); ***Transamerica Corp. v. United States***, 902 F.2d 1540 (Fed. Cir. 1990); ***Dew v. C.I.R.***, 91 T.C. 615 (1988); ***Hess v. United States***, 785 F. Supp. 137 (E.D. Wash. 1991) (members of Universal Life Church made contributions to church with understanding that church was to pay all personal bills incurred by the "contributor"). To enjoy tax-exempt status under section 501(c)(3), an organization

must satisfy three conditions: (1) it must be organized and operated exclusively for an exempt purpose (the organizational test); (2) no part of its net earnings may inure to the benefit of any private shareholder or individual (the operational test); and, (3) no substantial part of its activity may include carrying on propaganda, or otherwise attempting to influence legislation, or participating or intervening in any political campaign. ***Ecclesiastical Order of ISM of AM v. Commissioner***, 80 T.C. 833, 838 (1983); ***Unitary Mission of Church v. Commissioner***, 74 T.C. 507, 512 (1980), *aff'd without published opinion*, 647 F.2d 163 (2d Cir. 1981); 26 U.S.C. § 501(c)(3). The Fifth Circuit has explained:

> Under the inurement requirement, although a church may pay subsistence allowances to its members, . . . a member's ready use of the religious organization's funds for personal use or receipt of an unreasonable salary for services rendered violates the inurement requirement . . . . Of course, any salary received by defendants would be taxable to them.

United States v. Daly, 756 F.2d 1076, 1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985) (citations omitted). As noted in ***Daly***, if the minister receives an excessive or unreasonable salary from the net earnings of the church, this is deemed to be private inurement, and the church will fail the operational test. ***Daly***, 756 F.2d at 1083; ***United States v. Dykema***, 666 F.2d 1096, 1101 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); ***Hall v. C.I.R.***, 729 F.2d 632, 634 (9th Cir. 1984).

40.09[4] ***The First Amendment -- Freedom of Religion***

Tax protestors frequently attempt to use the Freedom of Religion clause of the First Amendment to prevent the government from questioning the integrity of the protestor's alleged religious activities. The courts have long held, however, that the Freedom of Religion clause cannot be used as a blanket shield to prevent the government from inquiring into the possible existence of criminal activity. ***Davis v. Beason***, 133 U.S. 333, 342-43 (1890); ***Cohen v. United States***, 297 F.2d 760, 765 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962).

Although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined. ***United States v. Seeger***, 380 U.S. 163 (1965). *See also* ***United States v. Moon***, 718 F.2d 1210, 1227 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Daly***, 756 F.2d 1076, 1081 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985); ***United States v. Dykema***, 666 F.2d 1096, 1098-1102 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); ***United States v. Ward***, 989 F.2d 1015, 1018 (9th Cir. 1992) ("focus of judicial inquiry is not definitional, but rather devotional . . . That is, is the defendant sincere? Are his beliefs held with the strength of traditional religious convictions?"); ***United States v. Peister***, 631 F.2d 658, 665 (10th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

In ***Moon***, the defendant argued that the trial court was obligated to charge the jury that it must accept as conclusive the Unification Church's definition of what it considered a religious purpose. The Second Circuit flatly rejected the defense argument, citing ***Davis v. Beason***, 133 U.S.

333 (1890), pointing out that foreclosing a court from analyzing a church's activities on the ground that the First Amendment forbids such inquiry "would mean that there are no restraints or limitations on church activities." ***Moon***, 718 F.2d at 1227. The Second Circuit concluded:

> The "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.

Moon, 718 F.2d at 1227.

In ***United States v. Jeffries***, 854 F.2d 254 (7th Cir. 1988), the defendant argued that the IRS should not be permitted to define what constituted a church because to do so would result in the creation of a "federal church, which would restrict a person's individual religious beliefs." ***Jeffries***, 854 F.2d at 256. In rejecting this argument, the court stated:

> There is no need to try to resolve any conflict there may be between a person's personal view of what constitutes a church and that which the tax law recognizes as a church qualifying it for tax exempt status, even if we could. For tax purposes, the tax law prevails.

Jeffries, 854 F.2d at 257.

Furthermore, there is no First Amendment right to avoid federal income taxes on religious grounds. ***United States v. Ramsey***, 992 F.2d 831 (8th Cir. 1993). Therefore, it does not violate the First Amendment to order a defendant to comply with federal income tax laws as a condition of probation.

Defendants' religious objections to filing tax returns signed under penalty of perjury does not eliminate the requirement that tax returns be filed. *See* ***Hettig v. United States***, 845 F.2d 794 (8th Cir. 1988); ***United States v. Dawes***, 874 F.2d 746 (10th Cir. 1989); ***Borgeson v. United States***, 757 F.2d 1071 (10th Cir. 1985). "[T]he requirement that the tax return be signed under penalty of perjury is not an unconstitutional restriction on defendant's right to freedom of religion." ***Dawes***, 874 F.2d at 749. *But see* ***Ward***, 989 F.2d at 1018 (conviction of tax protestor overturned because trial court refused to allow him to swear oath of his own creation; "the court's interest in administering the precise form of oath must yield to Ward's First Amendment rights").

As to whether an organization qualifies as a tax-exempt organization or whether an individual's contribution qualifies as a deductible charitable contribution, the courts also have held that the Internal Revenue Code sets forth objective requirements or criteria (*e.g.*, 26 U.S.C. §§ 170 and 501), which enable the Internal Revenue Service to make the required determination without entering into the type of subjective inquiry that is prohibited by the First Amendment. ***Dykema***, 666 F.2d at 1100; ***Hall v. C.I.R.***, 729 F.2d 632, 635 (9th Cir. 1984); *see also* ***United States v. Masat***, 948 F.2d 923, 927 (5th Cir. 1991) (proper for district court to give instruction that allowed

jury to decide whether defendant was a minister in a tax-exempt organization as defined in 26 U.S.C. § 501(c)(3)).

40.10 ***FALSE FORM 1099 SCHEMES***

The false Form 1099 scheme is one of the fastest growing schemes used by protestors to impede the administration of the tax laws and harass government employees. In many cases, the apparent purpose of this scheme is more to impede and annoy the IRS than to actually evade taxes. Usually, the scheme involves a protestor sending target individuals, such as IRS agents, judges, and politicians, a Form 1099-MISC indicating that the protestor paid those individuals non-employee compensation. These target individuals, however, actually have never had any financial dealings with the protestor. The protestor will also notify the IRS that these individuals have received 1099 income from the protestor, and many request rewards. This is a nuisance to the recipient of the Form 1099, who has the burden of explaining to the IRS any discrepancy between his or her return and the 1099 income reported by the protestor. *See* ***United States v. Hildebrandt***, 961 F.2d 116 (8th Cir.), *cert. denied*, 113 S. Ct. 225 (1992). Protestors who have engaged in these bizarre schemes are often charged under 26 U.S.C. § 7206(1) regarding Forms 1096 (transmitting the Forms 1099 to the IRS) and Forms 1040 (claiming refunds based on the false Forms 1099) and 26 U.S.C. § 7212(a), but this conduct may also give rise to charges under 18 U.S.C. §§ 1001, 287, and 371. *See* ***United States v. Krause***, 786 F. Supp. 1151, 1152 (E.D.N.Y.), *aff'd*, 978 F.2d 706 (1992) (sections 7206(1) and 7212(a)); ***United States v. Wiley***, 979 F.2d 365, 367 (5th Cir. 1992) (18 U.S.C. §§ 371, 472, 1001 and 1002); ***United States v. Dykstra***, 991 F.2d 450, 451 (8th Cir.), *cert. denied*, No. 93-5178 (U.S. Oct. 4, 1993) (sections 7206(1) and 7212(a)); ***United States v. Higgins***, 987 F.2d 543, 544 (8th Cir. 1993) (sections 7206(1) and 7212(a)); ***United States v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993) (sections 7206(1) and 7212(a), and 18 U.S.C. § 371); ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992) (sections 7206(1) and 7212(a)); ***United States v, Citrowske***, 951 F.2d 899 (8th Cir. 1991) (18 U.S.C. § 1001); ***United States v. Telemaque***, 934 F.2d 169, 170 (8th Cir. 1991) (18 U.S.C. § 371); ***United States v. Kuball***, 976 F.2d 529, 532 (9th Cir. 1992) (sections 7206(1) and 7212(a)); ***United States v. Parsons***, 967 F.2d 452, 453 (10th Cir. 1992) (18 U.S.C. §§ 287 and 1001).

40.11 ***WILLFULNESS***

40.11[1] ***Generally***

Willfulness in protestor cases involves the same underlying principles as it does in any criminal tax case. Accordingly, reference should be made to the discussion of willfulness in the Sections of the ***Manual*** pertaining to the other various tax offenses. *See* Section 8.06, *supra*.

Willfulness is the voluntary, intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United***

States v. Bishop, 412 U.S. 346, 360 (1973); ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); ***United States v. Schiff***, 801 F.2d 108, 110 (2d Cir. 1986), *cert. denied*, 480 U.S. 272 (1987); ***United States v. Snyder***, 766 F.2d 167, 170-71 (4th Cir. 1985); ***United States v. Masat***, 948 F.2d 923, 931 (5th Cir. 1991); ***United States v. Sassak***, 881 F.2d 276, 280 (6th Cir. 1989); ***United States v. Benson***, 941 F.2d 598, 613 (7th Cir. 1991); ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir. 1993); ***United States v. Kellogg***, 955 F.2d 1244, 1248 (9th Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1392 (10th Cir. 1991). It has the same meaning in both the felony and misdemeanor statutes of the Internal Revenue Code. *See* Section 8.06[1], *supra*.

Proof of willfulness may be based totally on circumstantial evidence. ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979); ***Hellman v. United States*** 339 F.2d 36, 38 (5th Cir. 1964); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Fingado***, 934 F.2d 1163, 1167 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). Because proof of willfulness usually must be established by circumstantial evidence:

> [T]rial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance.

United States v. Collorafi, 876 F.2d 303, 305 (2d Cir. 1989).

Circumstantial evidence, in protestor cases, held competent to establish willfulness includes:

1. Tax protest activities and philosophies. ***United States v. Turano***, 802 F.2d 10, 11-12 (lst Cir. 1986); ***United States v. Eargle***, 921 F.2d 56, 58 (5th Cir. 1991); ***United States v. Grosshans***, 821 F.2d 1247, 1252 (6th Cir. 1987);

2. Filing of blatantly false W-4 forms in one year relevant to show willfulness and absence of mistake in filing false Schedule C forms in earlier years. ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990);

3. Prior taxpaying history, such as the prior filing of valid tax returns followed by the filing of a protest return and a letter from the Internal Revenue Service telling the defendant that his return "did not comply with tax laws and might subject him to criminal penalties." ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v.***

DeClue, 899 F.2d 1465 (6th Cir. 1990); ***United States v. Green***, 757 F.2d 116, 123-24 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988);

4. Subsequent taxpaying conduct. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Richards***, 723 F.2d 646, 649 (8th Cir. 1983);

5. Filing false Forms W-4. ***United States v. Connor***, 898 F.2d 942, 945 (3d Cir. 1990), *cert. denied*, 110 S. Ct. 3284 (1990); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Carpenter***, 776 F.2d 1291, 1295 (5th Cir. 1985); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir.), *cert. denied*, 479 U.S. 933 (1986); ***United States v. Schmitt***, 794 F.2d 555, 560 (10th Cir. 1986);

6. The amount of a defendant's gross income. ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986) [*i.e.*, the higher the defendant's gross income, the less likely the defendant was unaware of the filing requirement and the more likely the defendant's failure was intentional rather than inadvertent];

7. Proof that knowledgeable persons warned the defendant of tax improprieties. ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993).

40.11[2] ***Good Faith Belief***

A defendant's conduct is not willful if the jury finds that the defendant's conduct resulted from "ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws." ***Cheek v. United States***, 498 U.S. 192, 202 (1991). Cheek claimed that he did not file tax returns because he believed that he was not a taxpayer within the tax laws, that wages are not income, that the Sixteenth Amendment did not authorize the taxation of individuals and that the Sixteenth Amendment was unenforceable. ***Cheek***, 498 U.S. at 195. The Court explained that:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, *whether or not* the claimed belief is objectively reasonable.

Cheek, 498 U.S. at 202 (emphasis added). The Supreme Court held that the trial court's jury instructions that Cheek's good faith beliefs or misunderstanding of the law would have to be objectively reasonable to negate willfulness were erroneous with reference to Cheek's non-constitutional arguments, stating:

> It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

Cheek, 498 U.S. at 203.

The trial court did not err, however, in instructing the jury not to consider Cheek's claims that the tax laws are unconstitutional:

> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance.

Cheek, 498 U.S. at 206. *See also* ***United States v. Saussy***, 802 F.2d 849, 853 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***United States v. Burton***, 737 F.2d 439, 442 (5th Cir. 1984); ***United States v. Latham***, 754 F.2d 747, 751 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 833 n.l (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); ***United States v. Karsky***, 610 F.2d 548, 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980); ***United States v. Mueller***, 778 F.2d 539, 541 (9th Cir. 1985); ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*,

459 U.S. 973 (1982).

The ***Cheek*** Court stated that a jury considering a good faith belief claim:

> would be free to consider any admissible evidence from any source showing that . . . [the taxpayer] was aware of his . . . [duties under the tax laws], including evidence showing his awareness of the Code or regulations, of court decisions rejecting his interpretations of the tax law, of authoritative rulings of the Internal Revenue Service, or any contents of the personal income tax return forms and accompanying instructions . . . .

Cheek, 498 U.S. at 202.

In determining whether a subjective good faith belief was held, a jury should not be precluded from considering the reasonableness of the taxpayer's interpretation of the law.

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Cheek, 498 U.S. at 203-04. After remand, the Seventh Circuit upheld Cheek's conviction, ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994), finding that the trial court's instruction that the jury could "consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good-faith" was proper. ***Cheek***, 3 F.3d at 1063. *See also* ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 112 S. Ct. 1411 (1993); ***United States v. Powell***, 955 F.2d 1206, 1212 (9th Cir. 1992) (jury may consider "the reasonableness of the interpretation of the law in weighing the credibility" of defendants' subjective belief that they were not required to file tax returns).

Tax protestors often claim that their beliefs that they are not required to file returns or pay taxes are based upon a careful study of legal decisions, statutes, legal treatises, and the like, and seek to have such materials admitted into evidence. *See, e.g.*, ***United States v. Bonneau***, 970 F.2d 929, 931 (1st Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1391 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1200 (1992). However, before such materials may be admitted, the taxpayer must lay a sufficient foundation of reliance. Nevertheless, the laying of such a foundation does not guarantee admissibility. Although legal and tax protestor materials upon which the defendant claims to have relied may be relevant to a good faith defense, there are competing interests which militate against the unrestricted admission of this type of evidence. The admission of such materials may confuse the jury as to the law, *see* ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1487 (1992); ***Willie***, 941 F.2d at 1395-97; ***United States v. Kraeger***, 711 F.2d 6, 7-8 (2d Cir. 1983); ***United States v. Stafford***, 983 F.2d 25, 28 n.14 (5th Cir. 1993); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Payne***, 978 F.2d 1177, 1181-82 (10th Cir. 1992), *cert. denied*, 112 S. Ct. 2441 (1993), and may assist a

defendant who wishes to undermine the authority of the court and turn his trial into a tax protestor circus, *see* ***Willie***, 941 F.2d at 1395 & n.8. The exclusion of such materials from evidence does not prevent a defendant from conveying the core of his defense to the jury: the defendant may still testify as to his asserted beliefs and how he supposedly arrived at them. *See* ***Barnett***, 945 F.2d at 1301; ***United States v. Hairston***, 819 F.2d 971, 973 (10th Cir. 1987). It is for the district court to weigh the various competing interests and determine, in its discretion, whether, to what extent, and in what form, legal materials upon which a defendant claims to have relied should be admitted in any given case. *See* ***Willie***, 941 F.2d at 1398; Fed. R. Evid. 403. [5]

A prosecutor should not seek to exclude such evidence in all situations. *See* ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992) (error not to allow defendant to read relevant excerpts of court opinions and Congressional Record upon which he assertedly relied in determining that he was not required to file tax returns); ***United States v. Powell***, 955 F.2d 1206, 1215 (9th Cir. 1992) ("In § 7203 prosecutions, statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element [willfulness] if the defendant lays a proper foundation which demonstrates such reliance."). Restraint should be exercised where appropriate so as not to jeopardize convictions on appeal. This is particularly true where the defendant has made a specific claim of reliance on a relatively limited amount of material. *See* ***Barnett***, 945 F.2d at 1301 n.3 (noting that exclusion of specific proffer of one or two sentences from an IRS handbook may have been error, albeit harmless, and contrasting this specific proffer with the "voluminous,'cover the waterfront' exhibits" that defendant had originally offered). In such a situation, the prosecutor should consider requesting a limiting instruction rather than opposing the admission of such evidence. [1]

For examples of jury instructions on willfulness and the good faith defense that have been upheld, *see* ***United States v. Droge***, 961 F.2d 1030, 1037-38 (2d Cir.), *cert. denied*, 113 S. Ct. 609 (1992); ***Stafford***, 983 F.2d at 27; ***United States v. Masat***, 948 F.2d 923, 931-32 (5th Cir. 1991); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993); ***United States v. Dykstra***, 991 F.2d 450, 452-53 (8th Cir. 1993); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991); ***United States v. Collins***, 920 F.2d 619, 622-23 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991).

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1 The prosecutor may be able to utilize the proffered evidence to demonstrate the implausibility of a defendant's claim of good-faith reliance.

40.12 *SELECTIVE PROSECUTION AND FREEDOM OF SPEECH*

40.12[1] *Generally*

Tax protestors have asserted that their prosecution violates their First Amendment right of freedom of speech. Protestors commonly argue that they are being prosecuted merely because of their vocalness. This is actually a selective prosecution defense, not a First Amendment defense. On the other hand, where the protestor is prosecuted under an aiding or abetting charge, *e.g.*, 18 U.S.C. § 2 or 26 U.S.C. § 7206(2), or a conspiracy charge, the protestor may claim that his or her counseling or advice to others was limited to speech, not action and, therefore, is protected under the First Amendment. It is this latter situation which may raise a true First Amendment freedom of speech issue.

40.12[2] *Selective Prosecution Defense*

The defense that protestors are being selectively prosecuted because of their vocalness, in violation of their First Amendment right of Freedom of Speech, is seldom successful and carries with it a heavy burden for the defendant. In ***United States v. Berrios***, 501 F.2d 1207 (2d Cir. 1974), the Second Circuit defined the defendant's burden on this issue as follows:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Berrios, 501 F.2d at 1211.

This standard has been widely adopted by other circuits. ***United States v. Michaud***, 860 F.2d 495, 499-500 (lst Cir. 1988); ***United States v. Damon***, 676 F.2d 1060, 1064 (5th Cir. 1982); ***United States v. McMullen***, 755 F.2d 65, 66 (6th Cir. 1984); ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); ***United States v. Holecek***, 739 F.2d 331, 333-34 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985); ***United States v. Aguilar***, 883 F.2d 662, 705 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1990); ***United States v. Amon***, 669 F.2d 1351, 1356 n.6 (10th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); ***United States v. Mangieri***, 694 F.2d 1270, 1273 (D.C. Cir. 1982).

The defendant has the initial burden of going forward and establishing the two parts of a *prima facie* case of selective prosecution. Once the defendant has made such a showing, the burden is on the government to show that there was no selective prosecution. The IRS is not required to

treat similarly all who engage in roughly the same conduct. ***Michaud***, 860 F.2d at 499. The defendant must overcome the presumption that the prosecution has been legitimately undertaken prior to being entitled to discovery or a hearing on the issue of selective prosecution. ***United States v. Bennett***, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 F.2d 925 (1976) (presumption exists that prosecution for violation of criminal law is in good faith).

This showing or "colorable basis" of selective prosecution is defined as "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." ***United States v. Berrios***, 501 F.2d at 1211-12. *See also* ***United States v. Moon***, 718 F.2d 1210, 1229 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986).

The Sixth, Seventh, and Eighth Circuits have held that the defendant must "raise a reasonable doubt about the prosecutor's purpose" to be entitled to a hearing. ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983); ***United States v. Falk***, 479 F.2d 616, 623 (7th Cir. 1973); ***United States v. Catlett***, 584 F.2d 864, 866 (8th Cir. 1978).

The Third, Fifth, Sixth, and Ninth Circuits have used such phrases as "colorable entitlement" to the defense, "some credible evidence," and enough facts "to take the question past the frivolous stage" in setting the threshold for requiring discovery or a hearing. ***United States v. Torquato***, 602 F.2d 564, 569-70 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); ***United States v. Berrigan***, 482 F.2d 171, 181 (3d Cir. 1973); ***United States v. Damon***, 676 F.2d 1060, 1064-65 (5th Cir. 1982); ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983); ***United States v. Oaks***, 508 F.2d 1403, 1404 (9th Cir. 1974).

As a practical matter, the government should resist discovery or a hearing on this issue until the defendant has made the requisite showing of selective prosecution. Otherwise, defendants may use frivolous claims of selective prosecution to obtain documents they otherwise would not be entitled to under Fed. R. Crim. P. 16, such as internal government memoranda.

Generally, the courts have upheld the government's targeting of vocal tax protestors for prosecution against selective prosecution attacks by defendants. ***United States v. Johnson***, 577 F.2d 1304, 1309 (5th Cir. 1978); ***United States v. Pottorf***, 769 F. Supp. 1176, 1184 (D. Kan. 1991). The government's initiation of prosecution because of a defendant's "great notoriety" as a protestor would not, as a matter of law, be an impermissible basis for prosecution. ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983). The defendant must also show that others similarly situated were not prosecuted and that the prosecution was based on some impermissible consideration, such as race or religion. ***United States v. Amon***, 669 F.2d 1351, 1356-57 (10th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). *See also* ***United States v. Rice***, 659 F.2d 524, 527 (5th Cir. 1981) ("selection for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in prompting more general compliance with the tax laws"). As the court stated, in ***United States v. Kelley***:

> There is no impermissible selectivity in a prosecutorial decision to prosecute the ringleader and instigator, without prosecuting his foolish followers, when a prosecution of the instigator can be expected to bring the whole affair to an end.

Kelley, 769 F.2d 215, 218 (4th Cir. 1985).

40.12[3] ***Freedom of Speech***

Where a defendant's speech is combined with action, *e.g.*, where a protestor both encourages and is actually involved in the preparation of protest returns for others, the defendant has gone beyond the protection of the First Amendment and may be subject to criminal prosecution. ***United States v. Citrowske***, 951 F.2d 899, 901 (8th Cir. 1991) ("freedom of speech is not so absolute as to protect speech or conduct which otherwise violates or incites a violation of the tax law"); ***United States v. Freeman***, 761 F.2d 549, 552 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986). *See also* ***United States v. Damon***, 676 F.2d 1060, 1062 (5th Cir. 1982). A taxpayer cannot claim protection under the First Amendment simply by characterizing his filing of false information and tax returns as "petitions for redress." ***United States v. Kimball***, 976 F.2d 529, 532 (9th Cir. 1992). Yet, where the protestor's activity is arguably limited to the mere giving of advice or counsel and there is no involvement in the actual preparation of tax returns or causing returns to be prepared, there may be a viable defense that activity is protected by the First Amendment right to freedom of speech. *But see* ***United States v. Barnett***, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.").

In ***Brandenburg v. Ohio***, 395 U.S. 444 (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." ***Brandenburg***, 395 U.S. at 447. Thus, the Court created an exception to First Amendment protection for speech

that incites imminent lawless activity, as opposed to speech that merely advocates violation of law, which may still be constitutionally protected.

There are a few tax protestor cases that address the issue of when providing advice or counsel steps beyond the protection of the First Amendment. In ***United States v. Buttorff***, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978), the Eighth Circuit held that the defendant's activities went beyond the scope of protection of the First Amendment, stating:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

Buttorff, 572 F.2d at 624. *See also* ***United States v. Moss***, 604 F.2d 569, 571 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); ***United States v. Freeman***, 761 F.2d at 551 (section 7206(2) charges based on Freeman's instructional seminars reversed due to trial court's failure to instruct that First Amendment defense was a question of fact for the jury).

"Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used as so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." ***Freeman***, 761 F.2d at 552. *See also* ***United States v. Damon***, 676 F.2d 1060, 1062 (5th Cir. 1982); ***United States v. Kelley***, 769 F.2d 215 (4th Cir. 1985).

In ***United States v. Turano***, 802 F.2d 10, 12 (1st Cir. 1986), the defendant in a section 7203 case claimed that his right to freedom of speech under the First Amendment had been violated by the introduction of evidence of his "tax protest" activities and instructions to the jury about "tax protestors." The court rejected this argument, explaining that the defendant:

> [W]as not convicted of speaking out against taxation or for encouraging others not to file but rather for willfully failing to file his own returns. In order to determine his state of mind, the jury was entitled to know what he said and did regarding federal income taxation. The First Amendment protects the appellant's right to express beliefs and opinions; it does not give him the right to exclude beliefs and opinions from a jury properly concerned with his motivations for failing to file.

Turano, 802 F.2d at 12.

40.13 *FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION*

Tax protestors often submit tax returns on which they refuse to provide any financial information, asserting their Fifth Amendment right against self-incrimination. In ***United States v. Sullivan***, 274 U.S. 259 (1927), the Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all. The Court indicated, however, that the privilege could be claimed against specific disclosures sought on a return, saying:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.

Sullivan, 274 U.S. at 263. *See also* ***Garner v. United States***, 424 U.S. 648, 650 (1976).

Sullivan is frequently cited for the proposition that a taxpayer may not use the Fifth Amendment to justify the failure to file any return at all. *See, e.g.*, ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Wunder***, 919 F.2d 34, 37 (6th Cir. 1990); ***United States v. Dack***, 987 F.2d 1282, 1284 (7th Cir. 1993); ***United States v. Poschwatta***, 829 F.2d 1477, 1482 n. 3 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); ***United States v. Leidendeker***, 779 F.2d 1417, 1418 (9th Cir. 1986); ***United States v. Stillhammer***, 706 F.2d 1072, 1076-77 (10th Cir. 1983); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (cases cited); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982).

A taxpayer may refuse to answer specific questions or disclose specific information, if such disclosure would be incriminating. The courts have uniformly held, however, that disclosure of the type of routine financial information required on a tax return does not, in itself, incriminate an individual and does not violate one's Fifth Amendment right against self-incrimination. ***United States v. Schiff***, 612 F.2d 73, 77-83 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir.), *cert. denied*, 464 U.S. 918 (1983); ***United States v. Warner***, 830 F.2d 651, 653-54 (7th Cir. 1987); ***United States v. Drefke***, 707 F.2d 978, 982-83 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir.), *cert. denied*, 434 U.S. 1012 (1977). *See also* ***United States v. Green***, 757 F.2d 116 n.7 (7th Cir. 1985) (affirming use of jury instruction that reporting income from legitimate activities would not fall within the Fifth Amendment privilege); ***United States v. Saussy***, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Carlson***, 617 F.2d 518 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980) (no valid Fifth Amendment privilege excusing failure to file Form 1040 to cover up false Form W-4 previously filed by defendant); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982).

A Fifth Amendment claim, however, may be asserted as to specific line items on tax forms. ***United States v. Sullivan***, 274 U.S. at 263; ***Edelson***, 604 F.2d at 234; ***United States v. Flitcraft***, 863 F.2d 342, 344 (5th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); ***United States v. Shivers***, 788 F.2d 1046, 1049 (5th Cir. 1986) (amount of taxpayer's income not privileged though source

may be); ***Heise***, 709 F.2d at 450-51; ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Turk***, 722 F.2d 1439, 1441 (9th Cir. 1983), *cert. denied*, 469 U.S. 818 (1984); ***United States v. Harting***, 879 F.2d 765, 770 (10th Cir. 1989).

The determination that the defendant's claim to the Fifth Amendment privilege against self-incrimination was invalid does not, however, prohibit the defendant from offering evidence to the effect that there was a good faith belief that he or she could properly assert the privilege. Such a good faith claim, even if erroneous, is a valid defense to the element of willfulness if believed by the jury. ***Shivers***, 788 F.2d at 1048 n.1; ***United States v. Saussy***, 802 F.2d 849, 854-855 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***Poschwatta***, 829 F.2d at 1482 n. 3; ***United States v. Goetz***, 746 F.2d 705, 710 (11th Cir. 1982).

Whether the defendant has validly exercised the privilege against self-incrimination is a question of law for the court. ***Turk***, 722 F.2d at 1440. Yet, whether the defendant has asserted the privilege in good faith, which could entitle the defendant to an acquittal on failure to file charges, is a question of fact for the jury to resolve. *Id.*; ***United States v. Smith***, 735 F.2d 1196, 1198 (9th Cir.), *cert. denied*, 469 U.S. 1076 (1984).

Returns containing little or no financial information from which a tax could be computed are sometimes referred to as "Fifth Amendment returns." The filing of a so-called Fifth Amendment return may constitute an affirmative act for the purposes of proving evasion. *See* ***United States v. Waldeck***, 909 F.2d 555, 559 (1st Cir. 1990) ("filing of returns containing only name, a signature, a figure for federal income tax withheld, asterisks at numbered lines in lieu of information and the statement '[t]his means specific exception is made under the Fifth Amendment, U.S. Constitution,'" is an affirmative act of evasion); ***United States v. DeClue***, 899 F.2d 1465, 1471 (6th Cir. 1990) (filing of return with no financial information and on which was typed: "object: self-incrimination" is affirmative act of evasion).

40.14 *MISCELLANEOUS FRIVOLOUS DEFENSES*

40.14[1] *Wages Are Not Income*

A common defense raised by protestors is that salaries and wages are not "income" within the meaning of the Sixteenth Amendment, which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived . . ."

The courts have uniformly interpreted the term "income" in its everyday usage to include wages and salaries. ***United States v. Connor***, 898 F.2d 942, 943-44 (3d Cir.), *cert. denied*, 497 U.S. 1029 (1990); ***United States v. Burton,*** 737 F.2d 439, 441 (5th Cir. 1984); ***United States v. Sassak***, 881 F.2d 276, 281 (6th Cir. 1989); ***United States v. Becker***, 965 F.2d 383, 389 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993); ***United States v. Sloan***, 939 F.2d 499, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992); ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); ***United States v. Buras***, 633 F.2d 1356, 1361 (9th Cir. 1980); ***United States v. Tedder***, 787 F.2d 540, 542 n.3 (10th Cir. 1986). *See* ***Jones v. United States***, 551 F. Supp. 578, 580 (N.D.N.Y. 1982), for a list of cases holding that wages are included in gross income.

40.14[2] ***District Court Jurisdiction of Title 26 Offenses***

Despite protestors' claims to the contrary, it is clear that United States District Courts have jurisdiction over criminal offenses enumerated in the Internal Revenue Code, notwithstanding want of a statute within Title 26 conferring such jurisdiction. Generally, this is based on the reasoning that 18 U.S.C. § 3231 gives the district courts original jurisdiction over "all offenses against the laws of the United States" and the Internal Revenue Code defines offenses against the laws of the United States. ***United States v. Huguenin***, 950 F.2d 23, 25 n.2 (1st Cir. 1991); ***United States v. Isenhower***, 754 F.2d 489, 490 (3d Cir. 1985); ***United States v. Eilertson***, 707 F.2d 108, 109 (4th Cir. 1983); ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992); ***United States v. Bressler***, 772 F.2d 287, 293 n.5 (7th Cir. 1985); ***United States v. Rosnow***, 977 F.2d 399, 412 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993); ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991) (citing cases); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). *See also* ***United States v. McMullen***, 755 F.2d 65, 67 (6th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985). The argument that the United States has jurisdiction only over Washington, D.C., federal enclaves and territories, and possessions of the United States has similarly been rejected. *See* ***Ward***, 833 F.2d at 1539.

40.14[3] ***Voluntariness of Filing Income Tax Returns***

Protestors commonly argue that the filing of income tax returns is voluntary. Not so. If the taxpayer has received more than the statutory amount of gross income, then he or she is obligated to file a return. ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); ***United States v. Tedder***, 787 F.2d 540, 542 (10th Cir. 1986). *See also* ***United States v. Hurd***, 549 F.2d 118 (9th Cir. 1977); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982) ("Every income earner is required to file an income tax return.") Under ***Cheek***, a protestor could, of course, present evidence that he held a good faith belief that the payment of taxes is "voluntary." *See* ***United States v. Dunkel***, 927 F.2d 955, 956 (7th Cir. 1991).

40.14[4] *Duty of IRS to Prepare Returns*

Protestors have argued that 26 U.S.C. § 6020(b)(1) [6] obligates the Internal Revenue Service to prepare a tax return for an individual who does not file before or in lieu of criminal prosecution. There is no merit to this claim. This provision merely provides the Internal Revenue Service with a civil mechanism for assessing the tax liability of a taxpayer who has failed to file a return. It does not excuse the taxpayer from criminal liability for that failure. ***United States v. Harrison***, 30 A.F.T.R.2d 72-5367, 5368 (E.D.N.Y.), *aff'd*, 486 F.2d 1397 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1487 (1992); ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

When a defendant raises this argument during trial, the court may properly instruct the jury that while section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good-faith defense." ***Powell***, 955 F.2d at 1213.

40.14[5] *Fourth Amendment Right Against Unreasonable Searches and Seizures*

The government's use at trial of income tax returns or Forms W-4 filed by the defendant does not violate his Fourth Amendment right against unreasonable searches and seizures. ***United States v. Warinner***, 607 F.2d 210, 212-13 (8th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); ***United States v. Amon***, 669 F.2d 1351, 1358 (10th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

The IRS has the authority to obtain evidence through the execution of search warrants. ***United States v. Rosnow***, 977 F.2d 399, 409 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993). In ***Rosnow***, the court noted that "Congress gave the IRS wide authority to conduct criminal investigations, including the execution of search warrants, regarding those individuals suspected of violating the tax laws." ***Rosnow***, 977 F.2d at 399; ***United States v. Dunkel***, 900 F.2d 105, 106 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991) (use of financial records obtained from taxpayer's garbage dumpster does not violate Fourth Amendment).

40.14[6] ***Unconstitutional Vagueness***

Sections 7203, 7205 and 7206 have withstood challenges that they are unconstitutionally vague. ***United States v. Lachmann***, 469 F.2d 1043, 1046 (lst Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (section 7203); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991) (section 7203); ***United States v. Parshall***, 757 F.2d 211, 215 (8th Cir. 1985) (section 7203); ***United States v. Russell***, 585 F.2d 368, 370 (8th Cir. 1978) (section 7203); ***United States v. Pederson***, 784 F.2d 1462, 1463-64 (9th Cir. 1986) (section 7203); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (section 7205); ***United States v. Buttorff***, 572 F.2d 619, 624-25 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978) (section 7205); ***United States v. Annunziato***, 643 F.2d 676, 677-78 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981) (section 7205); ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (section 7206).

40.14[7] ***Ratification of Sixteenth Amendment***

The contention that the Sixteenth Amendment was never legally ratified and that the federal government does not, therefore, have the authority to collect an income tax without apportionment has been flatly rejected. ***United States v. Sitka***, 845 F.2d 43, 44-47 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988); ***United States v. Benson***, 941 F.2d 598, 607 (7th Cir. 1991); ***In re Becraft***, 885 F.2d 547, 549 (9th Cir. 1989); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). As stated in ***United States v. House***, 617 F. Supp. 237 (W.D. Mich. 1985):

> The sixteenth amendment and the tax laws passed pursuant to it have been followed by the courts for over half a century. They represent the recognized law of the land.

House, 617 F. Supp. at 240.

40.14[8] ***Violation of the Privacy Act***

Circuit courts also have rejected Privacy Act challenges to the IRS Form 1040 instruction booklet and to Forms W-4. ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (not error to refuse to dismiss for failure to publish, pursuant to Privacy Act, notice of specific criminal penalty which might be imposed); ***United States v. Bressler***, 772 F.2d 287, 292 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986) ("the IRS notice . . . adequately and clearly informs taxpayers that filing is mandatory"); ***United States v. Wilber***, 696 F.2d 79, 80 (8th Cir. 1982) ("the Privacy Act does not require notice of a specific criminal penalty which might be imposed on the errant taxpayer"); ***United States v. Annunziato***, 643 F.2d 676, 678 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981) (notice in Form W-4 instructions adequate); ***United States v. Rickman,*** 638 F.2d 182, 183 (10th Cir. 1980) (Form 1040 instructions adequate).

40.14[9] ***Defendant Not A "Person" or "Citizen"***

In a section 7203 prosecution, it has been argued that the defendant was not a "person" within the meaning of the statute, which imposes an obligation to file on "any person" meeting the necessary requirements. This argument has been dismissed as frivolous. ***United States v. Karlin***, 785 F.2d 90, 91 (3d Cir. 1986), *cert. denied*, 480 U.S. 907 (1987). A similar argument has been rejected with respect to the term "individual" in section 7201 cases. *See* ***United States v. Studley***, 783 F.2d 934, 937 (9th Cir. 1986); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987). "All individuals, natural or unnatural, must pay federal income tax on their wages." ***Lovell v. United States***, 755 F.2d 517, 519 (7th Cir. 1984).

Protestors' "rejection" of citizenship in the United States in favor of state citizenship also does not relieve them of income tax requirements. *See* ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (citizens of the State of Texas are subject to the provisions of the Internal Revenue Code); ***United States v. Sloan***, 939 F.2d 499, 500-01 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992) ("strange argument" rejected); ***United States v. Silevan***, 985 F.2d 962, 970 (8th Cir. 1993) (rejecting as "plainly frivolous" defendant's argument that he is not a "federal citizen").

40.14[10] ***Federal Reserve Notes are Not Legal Tender***

Some protestors have argued that because their wages were paid in Federal Reserve Notes, they need not pay any taxes on those wages. Their argument, which has been uniformly rejected, is that the notes are not valid "currency" or legal tender, and thus, those who possess them cannot be subject to a tax on them. *See* ***United States v. Martin***, 790 F.2d 1215, 1217 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986); ***United States v. Buckner***, 830 F.2d 102, 103 (7th Cir. 1987); ***United States v. Brodie***, 858 F.2d 492, 498 (9th Cir. 1988); ***United States v. Condo***, 741 F.2d 238, 239 (9th Cir. 1984).

40.14[11] ***Tax Protest Against Government Spending***

A protestor who contends that his refusal to pay taxes or file returns is justified by his disagreement with government policies or spending plans is not entitled to a jury instruction on his theories. In fact, arguments challenging "the constitutionality of or validity of the tax laws are precluded because they are necessarily premised on a defendant's full knowledge of the law . . . and therefore make irrelevant the issue of willfulness." ***Cheek v. United States***, 498 U.S. 192, 203 (1991). The failure to furnish information on income tax returns cannot be justified by an asserted disagreement with the tax laws or in protest against the policies of the government. ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982). Similarly, a taxpayer who contends that paying taxes would require him to violate his pacifist religious beliefs cannot take refuge in the First Amendment. A taxpayer "has no First Amendment right to avoid federal income taxes on religious grounds." ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993).

40.14[12] ***Reliance on Advice of Counsel***

Reliance on the advice of an attorney in the preparation of incomplete or "Fifth Amendment" returns is a defense raised by some protestors. If the evidence presented at trial is sufficient to warrant it, the court should instruct the jury that the defendant's conduct is not "willful" if he acted with a good faith misunderstanding based on the advice of counsel. *See* ***United States v. Snyder***, 766 F.2d 167, 169 (4th Cir. 1985) (testimony not sufficient to justify instruction concerning good faith reliance); ***United States v. Becker***, 965 F.2d 383, 387-88 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993) (upholding refusal to give reliance instruction where there was no testimony that defendant told lawyer everything about his situation, that attorney gave defendant specific advice in response and that defendant followed that advice); ***United States v. Benson***, 941 F.2d 598, 615 (7th Cir. 1991) (proper to instruct jury that reliance on counsel was a "circumstance" to consider in determining willfulness).

The Seventh Circuit, in ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994), used the following test to determine whether Cheek was entitled to a reliance on counsel defense instruction:

> In order to establish an advice of counsel defense, a defendant must establish that: " (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report."

Cheek, 3 F.3d at 1061 (citing ***Liss v. United States***, 915 F.2d 287, 291 (7th Cir. 1990)). The Seventh Circuit held that Cheek was not entitled to the instruction because he did not seek advice on possible future conduct, but "merely continued on a course of illegal conduct begun prior to contacting counsel". ***Cheek***, 3 F.3d at 1062. Cheek did not make a full disclosure to his attorney nor follow his attorney's advice that he should obey the tax laws until told by a court that the laws were not valid. ***Cheek***, 3 F.3d at 1062.

40.14[13] ***Rule 404(b) Evidence: Proof of Willfulness***

Prior or subsequent bad acts of the defendant are often admissible to prove willfulness. Such evidence will be relevant to the issue of willfulness where, for instance, the defendant claims that he relied on the advice of others, in good faith, in filing false returns and did not know his conduct was improper. ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990) (evidence that defendant submitted Form W-4 in 1987 claiming more allowances than he was entitled to and did not file a return in 1987, relevant to show willfulness and absence of mistake in filing false Schedule C forms from 1982 to 1986). A defendant's attendance at protestor meetings has been held admissible to show that she knew what she was doing and knew she had an obligation to pay taxes. ***United States v. Grosshans***, 821 F.2d 1247, 1253 (6th Cir.), *cert. denied*, 484 U.S. 987 (1987).

When willfulness is an issue in a section 7203 case, prior filings may be relevant not just to show defendant's knowledge of filing requirements, but also to demonstrate a single scheme or common pattern of illegal conduct. ***United States v. Birkenstock***, 838 F.2d 1026, 1028 (7th Cir. 1987); *see also* ***United States v. Fingado***, 934 F.2d 1163, 1165 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). A pattern is relevant because it shows that the failure to file was not due to inadvertence, mistake, or confusion. ***Birkenstock***, 838 F.2d at 1028. Therefore, evidence of a defendant's prior and subsequent acts is probative of willfulness and should be admitted as long as it is not unduly prejudicial. *See* ***United States v. McKee***, 942 F.2d 477, 480 (8th Cir. 1990) (citing cases); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir.), *cert. denied*, 112 S. Ct. 58 (1991) (evidence that defendant had sent tax protestor materials to the IRS and had failed to comply with tax laws in prior and subsequent years probative of willfulness). Prior tax offense convictions of the defendant may also be admissible. ***United States v. Poschwatta***, 829 F.2d 1477, 1484 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

40.14[14] ***Probable Cause Hearings***

The government has the option, in misdemeanor cases, to charge the defendant by filing a criminal information, and issuing the defendant a summons instead of arresting him via a warrant. Protestors have argued, based on Fed. R. Crim. P. 9 and 4(a) requiring that a warrant shall not issue without probable cause, that use of a criminal summons violates their rights. The courts, however, have held to the contrary. *See* ***United States v. Saussy***, 802 F.2d 849, 851-52 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Birkenstock***, 823 F.2d 1026, 1030-31 (7th Cir. 1987); ***United States v. Dawes***, 874 F.2d 746, 750 (10th Cir. 1989); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986).

40.14[15] ***Costs of Prosecution***

The imposition of the costs of prosecution is mandated by most of the Title 26 tax offenses. *See* United States Attorneys' Manual (USAM) 6-4.350. The imposition of costs, as authorized, does not constitute cruel and unusual punishment. ***United States v. Dawes***, 874 F.2d 746, 751 (10th Cir. 1989). The judgment of conviction can be amended to include the costs of prosecution even after the defendant has filed a notice of appeal. ***United States v. Dennis***, 902 F.2d 591, 592-93 (7th Cir.), *cert. denied*, 498 U.S. 876 (1990).

The criminal tax statutes do not define "costs" so courts regularly look to 28 U.S.C. § 1920 for guidance on what expenses should be included. ***United States v. Dunkel***, 900 F.2d 105, 108 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991). The expenses of transportation and subsistence for witnesses employed by the United States, including the case agent, may be included as part of "costs." ***Dunkel***, 900 F.2d at 108.

40.14[16] ***Form W-2: Outdated Federal Register Regulation***

Some protestors have relied on a 1946 Federal Register regulation, allowing the filing of a Form W-2 in lieu of a Form 1040 tax return, to argue that they were not required to file a return since the IRS received a copy of their W-2 form from their employer. *See* ***United States v. Lussier***, 929 F.2d 25, 31 (1st Cir. 1991); ***United States v. Birkenstock***, 823 F.2d 1026, 1030 (7th Cir. 1987). The court in ***Birkenstock*** noted two problems with this argument: (1) that particular 1946 Federal Register regulation was eliminated when the Federal Register was codified in the 1949 CFR; and, (2) even if the 1946 regulation survived the CFR codification, the regulation provides that the employee's original Form W-2 can substitute for a Form 1040; therefore, the employer's filing of a copy of the W-2 would not suffice. ***Birkenstock***, 823 F.2d at 1030.

However, the defendant could testify regarding his good faith reliance on the regulation in deciding not to file a return. The 1946 regulation itself could not be admitted as an exhibit. ***Lussier***, 929 F.2d at 31.

40.14[17] ***Civil Assessments***

Protestors have argued, unsuccessfully, that where evasion of payment is charged, the government is required to prove a valid tax assessment by the IRS. *See* ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir. 1988); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985); ***United States v. Dack***, 747 F.2d 1172, 1174-75 (7th Cir. 1984); ***United States v. Voorhies***, 658 F.2d 710, 713 (9th Cir. 1981). The existence of a tax deficiency can be shown without proving a formal tax assessment. When the taxpayer fails to file a return, and the government is able to show a tax liability pursuant to the tax code, then a tax deficiency within the meaning of section 7201 is deemed to arise by operation of law on the date the return is due. ***Dack***, 747 F.2d at 1174; *but see* ***United States v. England***, 347 F.2d 425, 427 (7th Cir. 1965) (tax liability actually arose out of civil tax proceedings, and thus, government was required to prove a valid legal assessment).

40.14[18] ***Conditions of Probation***

Protestors frequently challenge the conditions of probation set by the court. The imposition of those conditions is reviewable for abuse of discretion. ***United States v. Schiff***, 876 F.2d 272, 275 (2d Cir. 1989). Tax offenders are generally required to file any delinquent returns and keep current with their taxes as a condition of probation. ***Schiff***, 876 F.2d at 275; ***United States v. Warner***, 830 F.2d 651, 653 (7th Cir. 1987); ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993); ***United States v. Shields***, 751 F.2d 247, 248 (8th Cir. 1984); ***United States v. Wolters***, 656 F.2d 523, 524-25 (9th Cir. 1981).

Discretionary conditions of probation must, however, be "reasonably related" to the goals of sentencing and involve only those deprivations of liberty and property that are reasonably necessary for such purposes. ***United States v. Stafford***, 983 F.2d 25, 28 (5th Cir. 1993) (citing 18 U.S.C. § 3563(b)). In ***Stafford***, the Fifth Circuit invalidated the requirement that the defendant give his probation officer access to "any financial information." ***Stafford***, 983 F.2d at 28. The court stated that:

> To the extent the conditions apply to tax years other than those which are the subject of this litigation, and for which Stafford may be held accountable during the period of probation, the broad obligation to provide access to *any* requested financial information interferes with Stafford's fourth and fifth amendment rights.

Stafford, 983 F.2d at 28.

The Fifth Amendment's privilege against self-incrimination will not shield a defendant from being required to file returns unless the defendant claims that the filing's contents would incriminate him by disclosing illegal income sources. ***Warner***, 830 F.2d at 655. "A taxpayer's fear of prosecution must arise from the return disclosing criminal activities independent of the return filing

process itself." ***Warner***, 830 F.2d at 656; *see also* ***Schiff***, 876 F.2d at 275-76.

40.14[19] ***26 U.S.C. § 6103(h)(5) Juror Audit Information***

Under 26 U.S.C. § 6103(h)(5), an attorney from the Department of Justice involved in "any judicial proceeding" and "any person (or his legal representative) who is a party to such proceeding" may obtain from the Secretary of the Treasury information as to whether any prospective juror has been the subject of an audit or other tax investigation by the IRS. The response of the Secretary is limited to a yes or no reply. In ***United States v. Hashimoto***, 878 F.2d 1126, 1132 (9th Cir. 1989), the Ninth Circuit considered, for the first time, the ramifications if such information cannot be or is not obtained prior to trial. The court held that although no specific requirements or conditions for inquiry and disclosure are set forth in the statute, "the statute itself contemplates that the defendant will be given sufficient time to send the list [of prospective jurors] to Washington, D.C. and receive a reply." ***Hashimoto***, 878 F.2d at 1132. In ***Hashimoto***, the list was given to the defense one week prior to trial. On appeal, the court held that the failure to supply the defendant with the jury panel list in enough time to inquire with the Secretary was reversible error because there existed a "significant *risk* of prejudice." ***Hashimoto,*** 878 F.2d at 1133-34. The court explained:

> Indeed, the fact that Congress saw fit to create such an absolute right suggests that there was a 'significant risk of prejudice.' This presumption might be overcome if the examination of the jurors during voir dire is such that the inference of risk of prejudice is negated.

Hashimoto, 878 F.2d at 1134. The court declined to decide whether an error under section 6103(h)(5) requires a *per se* rule of reversal or simply creates a presumptive risk of prejudice which could be overcome by the judge's *voir dire* questioning. The court held that under either test, reversal was required in the case before it because the *voir dire* was insufficient. In ***United States v. Nielsen***, 1 F.3d 855 (9th Cir. 1993), the Ninth Circuit held:

> [W]here, as here, there has been substantial disclosure by the IRS of persons audited and investigated, the trial court has supplemented the information by ***voir dire***, and there is no palpable suggestion of either party being prejudiced, § 6103(h)(5) was not violated.

Nielsen, 1 F.3d at 858.

In ***Nielsen***, the defendant moved for early disclosure of audit information on 100 potential venirepersons approximately five weeks before trial. The IRS was only able to respond positively regarding 17 individuals. In a hearing, the disclosure officer explained that the nonlisting of the 83 names meant that the IRS had been unable to recover information that the persons were audited, and that it was unlikely that additional searches would provide more information. The court found that the "statutory requirement had been substantially met," but stated that the court intended to ask each prospective juror whether the juror had been audited. ***Nielsen***, 1 F.3d at 858. The district court asked 24 out of 26 venirepersons about their audit history. The two who were inadvertently not questioned served on the jury without any objection from the defendant. *Id.* The Ninth Circuit held:

> The facts are more than sufficient to support a finding of substantial compliance. Indeed we are satisfied that the IRS made every effort which could reasonably be expected of it.

Id.

Other circuits have refused to establish a *per se* rule that reversal is required if a defendant does not receive juror information prior to trial as he is entitled to under section 6103(h)(5). *See* ***United States v. Droge***, 961 F.2d 1030, 1032-37 (2d Cir.), *cert. denied*, 113 S. Ct. 609 (1992); ***United States v. Masat***, 896 F.2d 88, 95 (5th Cir. 1990) ("any error in failing to grant Masat a continuance in order to obtain further information under 26 U.S.C. § 6103(h)(5) was harmless" because the jurors were asked the relevant questions by the trial judge); ***United States v. Spine***, 945 F.2d 143, 147 (6th Cir. 1991); ***United States v. Axmear***, 964 F.2d 792, 793 (8th Cir. 1992), *cert denied*, 113 S. Ct. 963 (1993); ***United States v. Callahan***, 981 F.2d 491, 495 (11th Cir.), *cert denied*, 113 S. Ct. 2972 (1993).

Most courts have held that errors in compliance with section 6103(h)(5) may be rendered harmless by appropriate *voir dire*. *See* ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991); ***Droge***, 961 F.2d at 1034; ***Masat***, 896 F.2d at 95; ***Spine***, 945 F.2d at 148; ***Axmear***, 964 F.2d at 793; ***United States v. Sinigaglio***, 942 F.2d 581, 583 (9th Cir. 1991) (rejecting *per se* rule of reversal raised as possible standard in ***Hashimoto***); ***Callahan***, 981 F.2d at 495. Where the court asks, during *voir dire*, whether any juror has been audited, harbors any ill feelings toward the IRS or has been the subject of investigation, the presumption of prejudice will probably be overcome. ***Callahan***, 981 F.2d at 495; ***Spine***, 945 F.2d at 148. Inquiries during *voir dire* have been deemed sufficient because jurors are under oath and there is a presumption that jurors respond truthfully to questions on *voir dire*. ***Masat***, 896 F.2d at 95; ***Spine***, 945 F.2d at 148.

Tax Division policy is to oppose defense motions for early release of the jury list and continuance of trial. Instead, the government should propose *voir dire* questions to determine whether any of the prospective jurors have been the subject of an IRS audit or investigation. ***Peterson Memorandum to United States Attorneys dated September 14, 1989***, pp. 3-4. *See* Section 3.00, *supra*. However, prosecutors in the Ninth Circuit must be mindful of the case law in their circuit.

Section 6103(h)(5) requests are governed by the Internal Revenue Manual Disclosure of Official Information Handbook section 1272(22)70 *et seq*. and handled by the IRS disclosure officer in each district in coordination with the Clerk of Court. Each judicial district has established its own procedures for responding to these burdensome requests. In general, the government, in opposing defendants' motions for early disclosure or continuance, will attach an affidavit of the IRS disclosure officer estimating the time required to obtain tax information regarding each member of the jury panel. [7]

As a practical matter, the government should try to convince the defendant to stipulate to only requiring the IRS to search records for the current and five preceding years, otherwise the government will have to search microfilm records. In some districts, the court will order the Clerk of Court to mail a list of potential jurors, their social security numbers, and addresses, to the IRS disclosure officer to conduct a 6103(h)(5) search. The Court will order the Disclosure Officer to mail the response (yes or no) to the clerk (omitting the social security numbers and addresses), copies of which will be provided to the defendant and United States on the morning of trial. In the likely event that the IRS has been unable to obtain information as to every potential venireperson, the prosecutor should make a record of substantial compliance by having the Disclosure Officer prepare an affidavit describing the government's search and likelihood of obtaining any additional information, or have the Disclosure Officer available for a hearing on the IRS's compliance, and by proposing relevant voir dire questions.

40.14[20] ***Paperwork Reduction Act Defense***

The ***Paperwork Reduction Act of 1980***, 44 U.S.C. § 3501 *et seq.* ("PRA"), was enacted to limit federal agencies' information requests that burden the public. The "Public Protection" provision of the PRA states that no person "shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved does not display a current control number assigned by the Office of Management and Budget [OMB] Director." 44 U.S.C. § 3512.

Protestors claim that they cannot be penalized for failing to file Form 1040 because the instructions and regulations associated with the Form 1040 do not display any OMB control number. This argument has been uniformly rejected on different theories. Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and since the Form 1040 does have a control number, there is no PRA violation. *See* ***United States v. Wunder***, 919 F.2d 34, 38 (6th Cir. 1990); ***Salberg v. United States***, 969 F.2d 379, 383-84 (7th Cir. 1992); ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir.), *cert. denied*, 113 S. Ct. 419 (1992); ***United States v. Dawes***, 951 F.2d 1189, 1191-93 (10th Cir. 1991). Other courts have held that Congress created the duty to file returns in 26 U.S.C. § 6012(a) and "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." ***United States v. Neff***, 954 F.2d 698, 699 (11th Cir. 1992). *See also* ***United States v. Kerwin***, 945 F.2d 92 (5th Cir. 1991) (*per curiam*) (defendant was convicted under statutory requirement that

he file return and since statute is not an information request, there is no violation of the PRA); ***United States v. Bentson***, 947 F.2d 1353, 1355 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2310 (1992) (defendant convicted of violating a statute requiring him to file, not a regulation lacking OMB number).

40.14[21] ***Admissibility of IRS Computer Records***

Computer data evidence is often introduced in tax cases to prove that the defendant did not file returns as required. Protestors often challenge such evidence and courts routinely reject such challenges. These records may be admitted under Federal Rule of Evidence 803(10) as certificates of lack of official records. *See* ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990); ***United States v. Spine***, 945 F.2d 143, 149 (6th Cir. 1991); ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992). Such records may be self-authenticating under Rule 902 if under seal or they may be authenticated by an IRS employee. No showing of the accuracy of the computer system needs to be made to introduce the documents. ***Ryan***, 969 F.2d at 240.

The introduction of the actual transcript of account through a witness can open the witness to cross-examination by the defense about every code and piece of information contained in the transcript. In order to avoid this problem, it may be wiser to simply offer the testimony of the IRS employee that a records search was conducted and it was revealed that no return was filed.

Some courts have admitted the records under Rule 803(8) notwithstanding the fact that since it is being offered in a criminal trial and is a matter "observed by law enforcement personnel," Rule 803(8)(C) would seem to forbid its introduction under that rule. These courts have distinguished between law enforcement reports prepared in routine, non-adversarial settings and those resulting from the more subjective endeavor or on-the-scene type investigations of a crime. *See* ***United States v. Wiley***, 979 F.2d 365, 369 (5th Cir. 1992); ***United States v. Wilmer***, 799 F.2d 495, 500-01 (9th Cir.), *cert. denied*, 481 U.S. 1004 (1987). In ***United States v. Hayes***, 861 F.2d 1225, 1230 (10th Cir. 1988), the Tenth Circuit agreed with the Fifth and Ninth Circuits that Rule 803(8)(C) does not compel the exclusion of documents which could properly be admitted under Rule 803(6) if the authoring officer or investigator testifies at trial, thus protecting the defendant's confrontation rights, which is the rationale underlying Rule 803(8).

40.14[22] ***Lack of Publication in the Federal Register***

Protestors have occasionally argued that Form 1040 and its instructions constitute a "rule" for purposes of the Administrative Procedure Act (APA) and therefore must be published in the Federal Register. This defense has been deemed "meritless." ***United States v. Bentson***, 947 F.2d 1353, 1360 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2310 (1992). It is the tax code itself, which is statutory, not regulatory, that imposes the duty to file a return. *See also* ***United States v. Bowers***, 920 F.2d 220, 221-23 (4th Cir. 1990) (APA protects only those with no notice; to reverse conviction court would need to find that the statutes provided no notice of obligation to pay taxes, the IRS forms and offices were secret although 2 million Americans know about them, and the defendants, who had previously filed returns, had forgotten about the required forms and the IRS offices).

40.14[23] ***IRS Agent's Testimony and Sequestration***

IRS agents usually testify during the course of a tax trial. Often such testimony will consist of summarizing the government's documentary evidence and providing tax requirements and calculations based on that testimony. Provided the agent has been properly qualified as an expert witness, would be helpful to the jury, and does not offer any opinion on the ultimate issue of guilt, such testimony is fully admissible. *See* ***United States v. DeClue***, 899 F.2d 1465, 1473 (6th Cir. 1990); ***United States v. Beall***, 970 F.2d 343, 347 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. Mann***, 884 F.2d 532, 539 (10th Cir. 1989). An IRS agent who does testify as an expert/summary witness should be allowed to remain in the courtroom during the trial, in addition to the case agent under Fed. R. Evid. 615. *See* ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991).

40.14[24] ***Attorney Sanctions***

Attorneys representing protestors will sometimes engage in "inappropriate and disruptive behavior." Such behavior is sanctionable. *See* ***United States v. Dickstein***, 971 F.2d 446, 447 (10th Cir. 1992) (revoking defense counsel's *pro hac vice* status); ***United States v. Summet***, 862 F.2d 784, 786-87 (9th Cir. 1988); ***United States v. Collins***, 920 F.2d 619, 633-34 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); ***In re Becraft***, 885 F.2d 547, 550 (9th Cir. 1990) (imposing $2500 sanction for filing frivolous petition for rehearing).

40.14[25] ***Discovery of IRS Master Files***

Under Fed. R. Crim. P. 16, the IRS's Individual Master File (IMF) will not be discoverable absent some showing of materiality or that some particular item of exculpatory evidence is contained therein. *See* ***United States v. Pottorf***, 769 F. Supp. 1176, 1181 (D. Kan. 1991). The defendant seeking such a file must show a "reasonable probability" that if the file was disclosed, the result of the proceeding would be different. However, if an IRS custodian testifies, based on the IMF, that no returns were filed, it is error, if the defendant contends that he did file returns, to deny the defendant's request for production of the IMF and to fail to conduct an *in camera* inspection of the file to see if it contains exculpatory material. ***United States v. Buford***, 889 F.2d 1406, 1407-08 (5th Cir. 1989).

40.14[26] ***IRS Agents' Authority***

In the Eighth Circuit, protestors have recently raised the bizarre argument that IRS agents cannot investigate tax offenses or appear in court because they are not agents of the United States government but are agents of an alien foreign principal, the International Monetary Fund. *See* ***United States v. Rosnow***, 977 F.2d 399, 413 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993). This argument has been deemed "completely without merit [and] patently frivolous." ***United States v. Jagim***, 978 F.2d 1032, 1036 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2447 (1993); *see also* ***United States v. Higgins***, 987 F.2d 543, 545 (8th Cir. 1993).

40.14[27] ***Indictment: Sufficient Notice of Illegality***

Despite one protestor's argument to the contrary, an indictment citing 26 U.S.C. §§ 7201 and 7203 violations properly charge crimes, even though it lacks a cite to 26 U.S.C. § 6012, the section that requires a return to be filed. *See* ***United States v. Vroman***, 975 F.2d 669, 670-71 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1611 (1993). So long as the indictment contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to "plead an acquittal or conviction in bar of future prosecution for the same offense," the indictment is constitutionally sufficient. ***Vroman***, 975 F.2d at 670 (quoting ***Hamling v. United States***, 418 U.S. 87, 117 (1974)).

In a similar vein, the Ninth Circuit has rejected the argument that an indictment charging a violation of 26 U.S.C. § 7206 and setting forth the elements of the offense was insufficient simply because the CFR provisions dealing with the enforcement of section 7206 reference the Bureau of Alcohol, Tobacco and Firearms, an agency unrelated to the case against the defendant. ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993). An indictment need only provide "the essential facts necessary to apprise the defendant of the crime charged; it need not specify the theories or evidence upon which the government will rely to prove those facts." ***Cochrane***,

985 F.2d at 1031.

40.15 *MISCELLANEOUS PROCEDURAL ISSUES*

40.15[1] *Right to Counsel, Right to Counsel of Choice, Right to Representation by Lay Person or Unlicensed Counsel, Right to Defend Pro Se*

The Sixth Amendment grants a defendant the right to be represented by counsel and the right to defend *pro se*. This includes the right to be represented by counsel of his or her choice, so long as that choice does not unreasonably interfere with a court's need to control its schedule. ***Wheat v. United States***, 486 U.S. 153, 159 (1988); ***United States v. Lillie***, 989 F.2d 1054, 1055 (9th Cir. 1993); ***United States v. Collins***, 920 F.2d 619, 624-25 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991). "A defendant's right to retained counsel of his choice doesn't include the right to unduly delay the proceedings." ***Lillie***, 989 F.2d at 1056.

In protest prosecutions, an issue that often arises is whether the defendant has the right to be represented by a fellow protestor, who is not an attorney. A defendant has no constitutional right to be represented by or have the assistance or advice at trial of a lay person or unlicensed counsel. ***United States v. Lussier***, 929 F.2d 25, 28 (1st Cir. 1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986); ***United States v. Thibodeaux***, 758 F.2d 199, 201 (7th Cir. 1985); ***United States v. Schmitt***, 784 F.2d 880 (8th Cir. 1986); ***United States v. Turnbull***, 888 F.2d 636, 638 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); ***Tyree v. United States***, 892 F.2d 958, 959 (10th Cir. 1989); ***United States v. Dawes***, 874 F.2d 746, 748 (10th Cir. 1989).

A court may, however, in its discretion, allow a lay person to assist or advise the defendant. *See* ***United States v. Benson***, 592 F.2d 257, 258 (5th Cir. 1979); ***United States v. Whitesel***, 543 F.2d 1176, 1177-80 (6th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

Defendants also frequently seek to represent themselves. A defendant's right to proceed *pro se* is conditioned on the court finding that the defendant has knowingly, intelligently, intentionally, and voluntarily waived his or her right to counsel. ***Faretta v. California***, 422 U.S. 806, 818, 835 (1975); ***United States v. Auen***, 864 F.2d 4, 5 (2d Cir. 1988); ***United States v. Verkuilen***, 690 F.2d 648, 658 (7th Cir. 1982); ***United States v. Causey***, 835 F.2d 1289, 1293 (9th Cir. 1987); ***United States v. Allen***, 895 F.2d 1577, 1578 (10th Cir. 1990). The court should engage in a colloquy with the defendant to ensure that the defendant knows the nature of the charges, the possible penalties, and the dangers of self representation. ***Causey***, 835 F.2d at 1293; ***United States v. Harris***, 683 F.2d 322, 324 (9th Cir. 1982).

The court can appoint counsel, even over the defendant's objection, to "standby" at trial and advise or provide information to the defendant regarding routine protocol, procedure, and evidentiary matters. There is no constitutional right, however, to standby counsel. ***McKaskle v. Wiggins***, 465 U.S. 168, 183, 184 (1984); ***United States v. Olson***, 576 F.2d 1267, 1270 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978); ***United States v. Gigax***, 605 F.2d 507, 517 (10th Cir. 1979). Standby counsel must allow the defendant to retain actual control over his or her case and not

destroy the jury's perception that the defendant is representing himself or herself. ***United States v. Walsh***, 742 F.2d 1006, 1007 (6th Cir. 1984). For a discussion of the proper role of standby counsel, *see* ***McKaskle v. Wiggins***, 465 U.S. 168, 177-85 (1984).

A defendant who does not wish to proceed *pro se*, but cannot afford to retain counsel of her choice, is not entitled to appointed counsel who shares her political or protest beliefs. ***United States v. Grosshans***, 821 F.2d 1247, 1251 (6th Cir.), *cert. denied*, 484 U.S. 987 (1987); ***United States v. Lillie***, 989 F.2d 1054, 1055 (9th Cir. 1993); ***Collins***, 920 F.2d at 625 n.8; ***United States v. Willie***, 941 F.2d 1384, 1391 (10th Cir. 1991).

Following trial, many protestors will allege ineffective assistance of counsel based on their attorney's failure to proceed with their defense in the way the protestor desired. Such arguments should be judged under the usual ***Strickland*** [***Strickland v. Washington***, 466 U.S. 668 (1984)] test. *See* ***United States v. Michaud***, 925 F.2d 37, 43 (1st Cir. 1991) (failure to cross-examine witness in particular manner demanded by defendant not ineffective assistance); ***United States v. Cochrane***, 985 F.2d 1027, 1030 (9th Cir. 1993) (failure to present unusual authorities on which defendant relied in deciding not to file was "reasonable trial strategy").

The reverse situation has also arisen. In ***United States v. Masat***, 896 F.2d 88 (5th Cir. 1990), the defendant claimed ineffective assistance after his attorney did exactly what the defendant asked him to do at trial. The court stated that defendant would not be permitted "to avoid conviction on the ground that his lawyer did exactly what he asked him to do." ***Masat***, 896 F.2d at 92. Similarly, a defendant who has knowingly and intelligently waived his right to counsel cannot complain of ineffective assistance of counsel on appeal. ***United States v. McMullen***, 755 F.2d 65, 66 (6th Cir. 1984).

Protestors may attempt to get continuances of a trial by purposely failing to obtain an attorney and requesting more time to do so. Such disruptions and delays need not be tolerated passively by the court. ***United States v. Studley***, 783 F.2d 934, 938-39 (9th Cir. 1986). A district court has broad discretion to grant or deny a continuance. Only an "unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay" will constitute an abuse of that discretion. ***Lussier***, 929 F.2d at 28 (*quoting* ***United States v. Torres***, 793 F.2d 436, 440 (1st Cir.), *cert. denied*, 479 U.S. 889 (1986)); ***United States v. Rosnow***, 977 F.2d 399, 411 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993); ***United States v. Bogard***, 846 F.2d 563, 566 (9th Cir. 1988). "The right to counsel as well as the right to counsel of one's choice may be waived if one able to afford counsel does not retain an attorney within a reasonable period of time." ***United States v. Thibodeaux***, 758 F.2d 199, 201 (7th Cir. 1985); *see also* ***United States v. Jagim***, 978 F.2d 1032, 1038 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2447 (1993).

Caution is advised, however, on forcing a defendant to trial without an attorney. In ***United States v. Kennard***, 799 F.2d 556 (9th Cir. 1986), the defendant waived counsel and proceeded with assistance of lay counsel. The jury was unable to reach a verdict, and the trial court, weary of the defendant's repeated attempts to delay and disrupt the trial, denied the defendant's motion for a continuance of the retrial to obtain representation. The Ninth Circuit overturned the resulting

conviction, holding that the earlier waiver of counsel had no effect on the defendant's right to counsel at the second trial. ***Kennard***, 799 F.2d at 557.

The reason for the court's denial of a continuance to obtain counsel should be made clear on the record. In ***United States v. Wadsworth***, 830 F.2d 1500 (9th Cir. 1987), the Ninth Circuit ordered a new trial because there was no record that the defendant was attempting to interfere with the efficient administration of justice by requesting a continuance to retain counsel. ***Wadsworth***, 830 F.2d at 1504-05. The court held that the defendant did not waive his right to counsel by failing to request a court-appointed attorney, stating, "[a]n indigent defendant's right to counsel under the Sixth Amendment is not contingent upon his request for appointed counsel." ***Wadsworth***, 830 F.2d at 1505.

In order to obtain court-appointed counsel, the defendant must prove he lacks the resources to retain counsel. A defendant who refuses, on Fifth Amendment grounds, to submit a financial affidavit to the court may impliedly waive his right to counsel. *See* ***United States v. Davis***, 958 F.2d 47, 48-49 (4th Cir.), *cert. denied*, 113 S. Ct. 223 (1992). In such cases, the court can order that the government not use the information supplied by the defendant as part of its direct case. The court need not grant defendant's request that such information be supplied to the court *in camera* and without the government's participation. *See* ***United States v. Harris***, 707 F.2d 653, 663 (2d Cir.), *cert. denied*, 464 U.S. 997 (1983); ***United States v. Sarsoun***, 834 F.2d 1358, 1363 (7th Cir. 1987). Until the government attempts to use the information obtained against the defendant at trial, "any encroachment on the Fifth Amendment protection against self-incrimination is speculative and prospective only." ***Sarsoun***, 834 F.2d at 1364. The defendant's Sixth Amendment rights are not violated when a court refuses to appoint counsel until the defendant completes the required forms. ***United States v. Krzyske***, 836 F.2d 1013, 1018-19 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988).

40.15[2] ***Jury Nullification***

"Jury nullification" is the concept that a jury has the right to ignore a judge's instructions on the law in a trial if they feel the law is unjust and acquit the defendant even if the government has proven guilt beyond a reasonable doubt. Protestors often argue that the authors of the Bill of Rights intended the Sixth Amendment to incorporate such a right. There is no constitutional right to a jury nullification instruction. ***United States v. Krzyske***, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding court's response to jury's inquiry about meaning of "jury nullification" that "[t]here is no such thing as valid jury nullification. Your obligation is to follow the instructions of the court as to the law given to you."); ***United States v. Drefke***, 707 F.2d 978, 982 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978); ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). *See also* ***United States v. Dougherty***, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972) for a thorough discussion of the issue of jury nullification and its historical origins.

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1. The Tax Division maintains a "Criminal Tax Protest Case Issues List" which tracks recurring issues in these prosecutions. The list is updated annually and contains more than 40 issues. The list is available on Juris in the Protest file within the tax file group. Prosecutors interested in obtaining a copy of the protest list should contact the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (202) 514-5396.

2. The statute of limitations for supplying a false Form W-4 in violation of section 7205 is three years -- *not* the six years common to most criminal tax offenses. 26 U.S.C. § 6531. But the statute of limitations is six years where the charge is a ***Spies*** evasion, pursuant to section 7201. *See* Section 40.04, *infra*.

3. Some courts have held that a defendant cannot be sentenced on both ***Spies*** evasion and failure to file charges regarding the same year because section 7203 is a lesser included offense of section 7201. ***United States v. Snyder***, 766 F.2d 167, 171 (4th Cir. 1985); ***United States v. Buckley***, 586 F.2d 498, 504-05 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Tax Division Memorandum dated February 12, 1993 Regarding Lesser Included Offenses adopts the strict elements test of ***Schmuck v. United States***, 489 U.S. 705, 709-10 (1989), and concludes that a section 7203 failure to file is not a lesser included offense of a section 7201 attempted evasion of tax. *See* Section 8.08, *supra*.

4. This Section also prohibits assaults on Internal Revenue Service personnel. The Criminal Division has jurisdiction over this offense. *See* United States Attorneys' Manual (USAM) 9-65.601, 9-65.602, and 9-65.624.

5. Among the factors which would be relevant to such a determination would be the centrality of these materials to a defendant's claimed misunderstanding of the tax laws, the materials' length and potential to confuse the jury, *see* ***Barnett***, 945 F.2d at 1301 n.3, the degree to which such materials are merely cumulative to a defendant's testimony or to other evidence, the extent to which a defendant may be attempting to use them to instruct the jury on the law or to propagate tax protestor beliefs, and the potential utility of limiting instructions, *see and compare* ***United States v. Powell***, 955 F.2d 1206, 1214 (9th Cir. 1992), *and* ***Willie***, 941 F.2d at 1404 n.4 (Ebel, J., dissenting), *with* ***Willie***, 941 F.2d at 1395 (majority opinion).

6. Section 6020(b)(1) of the Code (Title 26) provides that if a person fails to make a return required by law, then the Internal Revenue Service "shall" make a return based on information available to it.

7. A search of tax information regarding the current and five preceding years for 100 prospective jurors will generally take 5-10 business days, if the jurors' social security numbers and addresses are provided. However, information regarding some of the jurors may take longer to obtain if the juror has moved or remarried. A microfilm search of records from 1964 to the five years preceding the current year could take up to three months to perform.