IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

United States of America,	§	
	§	
Plaintiff,	§	
v.	§	
	§	**Case No. 4:03-CR-188-A**
Richard M. Simkanin	§	
	§	
Defendant.	§	
	§	

DEFENDANT'S MOTION NO. 17
MOTION TO QUASH INDICTMENT AND MOTION TO DISMISS
FOR WANT OF PERSONAL AND SUBJECT MATTER JURISDICTION

COMES NOW Richard M. Simkanin, by and through his attorney of record Arch C. McColl III, and files this MOTION TO QUASH INDICTMENT AND MOTION TO DISMISS FOR WANT OF PERSONAL AND SUBJECT MATTER JURISDICTION, and shows the Court as follows:

Defendant has been charged by *Indictment* with 27 counts of alleged criminal violations. For reasons set forth hereinbelow, the charging instrument is *fatally defective* and should be QUASHED and the charges against the defendant should be DISMISSED for WANT OF PERSONAL AND SUBJECT MATTER JURISDICTION.

I.
SUMMARY OF ARGUMENT

1. The Defendant, by and through this motion, challenges the personal jurisdiction over Richard M. Simkanin as that jurisdiction must arise under 18 USC § 287 and

under 26 USC §7201 and be specifically shown to apply to the defendant, in his individual capacity, or in any official capacity or office he may hold.

2. The federal courts have consistently held to the principle that **once jurisdiction is challenged the court has no authority to do anything but take action on that motion.** As the Supreme Court held in *The State of Rhode Island v. The State of Massachusetts*, 37 U.S. 709, once the question of jurisdiction is raised "it must be *considered* and *decided* before the court can move one step further." [Italics added] "Jurisdiction **cannot be assumed** by a district court nor conferred by agreement of parties, but it is incumbent upon plaintiff to allege in clear terms, the necessary facts showing jurisdiction which must be proved by convincing evidence." *Harris v. American Legion*, 162 F. Supp. 700. [See also *McNutt v. General Motors Acceptance*, 56 S. Ct. 780.]
3. The charges for 18 USC §287 arise from funds sent to the IRS in 1997, 1998 and 1999. The Secretary of the Treasury is the *only* officer of the federal government authorized by Congress to administer the internal revenue laws and to collect a tax. IRC § 6301. Pursuant to 5 USC § 3331 and 3332, the Secretary of the Treasury is required to *file* an Oath of Office and an Appointment Affidavit before he has any authority or power under his office. Unless and until the Secretary of the Treasury files an Oath of Office and an Appointment Affidavit, he has NOT entered the authority of the office. Defendant has obtained documents that show the Court that from January of 1993 until July 1999 the Office of Secretary of Treasury was VACANT because neither Lloyd Bentsen nor Robert Rubin filed an Oath of Office or an Appointment Affidavit. Therefore, neither Mr. Bentsen nor Mr. Rubin entered upon their office. There can be no argument that overcomes the FAILURE of Mr. Bentsen or Mr. Rubin to

knowingly and intentionally commit the OMMISSION to file the Oath and the Appointment Affidavit that must be filed by every OFFICER of the federal government before they have ANY power or authority from the position to which they have been appointed. The appointment is NOT complete and does NOT exist in LAW until the Oath and the Appointment Affidavit have been filed. Notwithstanding that 18 USC §□287 is barred by statute to be used as a prosecution for a claim under the internal revenue laws, and, notwithstanding the fact that the claims are NOT false, because the 18 USC § 287 charges pertain to funds paid to the IRS during years when there was no Officer in Office to collect taxes or administer the internal revenue laws, the charges are groundless and wholly without foundation. The Court is in want of personal and subject matter jurisdiction over the defendant for allegations arising under the internal revenue law or the Department of the Treasury when there was no Officer in Office to administer the internal revenue laws or administer the Department of the Treasury during the time in question.

4. Because, as will be shown, the indictment if *fatally defective* for failure to state the nature and cause of the accusation and fails to state the most basic elements of the alleged criminal acts, the defendant, herein, challenges the subject matter jurisdiction of the Court.

5. The indictment purports to be a criminal action initiated by a plaintiff, "*United States of America,"* for alleged violations of laws or administrative codes of the federal United States government. The defendant has no knowledge of any set of laws that would apply to him that would allow him to be subjected to a suit by an entity known as "*United States of America."* Upon information and belief, the "*United States of America"* exists only as the UNION of the 50 States *united*, said

entity having CREATED the federal "United States" government by and through the ratification of the Federal Constitution. Therefore, defendant contends that "*United States of America"* does not exist in any capacity to file a suit or bring a criminal prosecution against anyone. While Congressional Acts, as will be shown hereinbelow, *do authorize* actions to be brought in the name of the "*United States of America ss The President of the United States of America*," under admiralty, the defendant asserts that the laws that authorize such an action are *not* laws that are applicable to him. Therefore, absence a showing by the government of the lawful authority granted by Congress to bring the instant action in the name of "United States of America" the court is in want of personal and subject matter jurisdiction over the defendant.

6. Absent a constitutional and statutory authorization, the Court is without subject matter jurisdiction to hear a matter brought by a plaintiff with NO STANDING to file a criminal action. Without proof thereof, the indictment must be quashed and the charges dismissed for want of subject matter jurisdiction.

7. *Plain error* voids the *indictment* for failure to comply with Rule 6 (f) of the Federal Rules of Criminal Procedure. Rule 6 (f) requires that, "An indictment may be found *only* upon the concurrence of 12 or more jurors. The indictment *shall* be returned by the grand jury to the federal magistrate *in open court*." The *indictment* was NOT found by 12 jurors. There does not exist any record that the indictment was returned by a concurrence of 12 grand jurors in open court. The *plain error* violations of Rule 6 (f) make the indictment a *nullity* and the court is without subject matter jurisdiction to act on the void indictment.

8. A *plain error v*iolation of Rule 6 (f) is acting as a shield behind which the government has hidden the FACT that two separate grand juries failed or refused

to return an indictment against the defendant. Rule 6 (f) mandates that when "12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge." Id.

9. The defendant believes the record is clear that when the grand jury was allowed the opportunity to *hear* and *view* the exculpatory evidence that essentially is the *foundation* of the defendant's case in chief, that they realized the defendant had NOT committed any criminal act, but rather was acting fully within the confines and mandates of the law. While this may seem beyond reason to the Court, failure to have the ability to even entertain such a possibility is solely symptom of information being withheld from the Court via various strategies employed to keep the TRUTH hidden. Essentially, these acts are nothing less than *obstruction of justice*.
10. A separate motion will be filed that deals solely with the *selective and vindictive prosecution* of this defendant who was targeted and has been *castigated* simply because his views and his free speech activities are unpopular with those whose power and authority he has challenged. Such acts are the pinnacle of the very form of tyranny that the government was created to ensure such could never again debase the American people. But we are here and the vindictiveness of the prosecution is undeniable.
11. When two grand juries would NOT return an indictment against Mr. Simkanin after hearing his presentations and viewing his evidence, the government *forum shopped* its AGENDA to a THIRD grand jury. Strategies were then implemented to ensure that THIS grand jury was NOT allowed to hear the defendant or view his evidence. The defendant is confident that false or misleading information was proffered to this THIRD grand jury to cause them NOT to view KNOWN

EXCULPATORY EVIDENCE. The grand jury's failure to review known evidence and allow that evidence to be presented by Mr. Simkanin is a violation of the oath taken by the jurors and the duty imposed upon them by the Constitution and Rule of Law.

12. Any and all actions done to ensure that the grand jury did NOT hear Mr. Simkanin and view his exculpatory evidence can only be viewed as *obstruction of justice, withholding evidence* and *interfering with a grand jury investigation.*

13. As will be developed more fully in a separate motion, this *selective and vindictive prosecution* nullifies the *indictment* and strips the Court of any personal or subject matter jurisdiction over the defendant.

14. Defendant has been charged with violating 26 USC § 7202. Defendant challenges the validity of the indictment in that it purports a violation of Title 26 of the United States Code. Title 26 has never been enacted as the general and permanent law of the United States. This Courts *only* authority to hear suits arising under the *laws of the United States*. As will be shown in the memorandum, federal law strictly prohibits citing anything as "U.S.C." unless and until that TITLE has been enacted into law. There is *no authority* to cite to anything as "Title 26" or "26 U.S.C." There is no such law as 26 USC 7202. Defendant cannot be indicted or convicted for violating a law that does not exist.

15. There are no published regulations of any kind for IRC § 7202. Therefore under the authority of the Administrative Procedures Act found at 5 USC § 552 and the authority of United States v. Mersky, 361 U.S. 431, Section 7202 of the administrative code of the internal revenue laws is *without force and effect of law*. In United States v. Mersky, 361 U.S. 431, 437-438 the United States Supreme Court held that: **"The result is that neither the statute nor the regulations are**

complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other." *Id*. According the highest Court in the land, IRC §7202, absent an implementing regulation, has no force or effect of law. This Court is without subject matter jurisdiction over an indictment of an alleged violation of a code section that has no implementing regulation and is, therefore, without force or effect of law.

16. Even if a superceding indictment is issued to charge the Defendant with a violation of the Internal Revenue Code (IRC) modifying the charge to IRC § 7202[1] and the government could somehow place the Defendant under the authority of the *administrative* Internal Revenue Code, the defendant unequivocally challenges the subject matter jurisdiction of the court over Defendant as the "person" clearly and exclusively defined at IRC § 7343 who can be prosecuted for an alleged violation of the Internal Revenue Code Sections 7202. As will be clearly shown in the memorandum the Statute at Large from which § 7202 was derived clearly shows that § 7343 applies directly to § 7202 because, in the Statute at Large, 53 Stat 145, they exist as subsections (b) and (c) respectively. And the "person" defined who can be penalized under §7202 cannot

[1] Modifying the charge to IRC §7202 would effectively be an *admission* that the defendant is subjected to a code that is purely administrative in nature and is administered and enforced by and through the United States Tax Court. The U. S. Tax Court is purely administrative adjudicating civil actions where the parties are "petitioner" and "respondent," and the all citations to the existing TAX LAW is the Internal Revenue Code (IRC) as mandated by Congress. The U. S. Tax Court has it own set of Rules (not the F.R.Civ.Pro.) and all references to the Tax Code within the entirety of the Rules are cited as "IRC." There is *never* a citation by the Tax Court, a pleading filed in Tax Court by the government, or an OPINON issued by a Tax Court Judge that contains a citation to "26 USC" because no such set of laws (Title) exist, having never been enacted into law by Congress. The IRC, however, was enacted as an administrative code and Congress mandated that it be cited as "IRC."

possibly be shown to be the defendant because the defendant was not, and could not be certified to be a *withholding agent* of and for the federal United States government. Further, discovery propounded on the government will prove that the defendant was *not* a withholding agent as clearly defined and required by law to collect taxes and hold those taxes in *Trust* as a *Trustee* of the United States government. *See* IRC § 7501 ("Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a ***special fund in trust*** for the United States.").

17. The defendant is charged with violating a PENALTY STATUTE at IRC § 7202. It is not *possible* to violate a PENALTY STATUTE. The *plain language* of § 7202 applies to a person "required under this title" to collect a "tax imposed by this Title" as "provided by law." Clearly, the *violation of law* is OUTSIDE the penalty statute. However, the *indictment* fails completely to provide a code section "required under this title" or "tax imposed by this title." Therefore, it is IMPOSSIBLE for the defendant to know the *nature and cause* of the accusation against him.

18. Under the authority of the binding judicial decision of United States v. Menk, 200 F. Supp. 784, (1966)[2], where Mr. Menk was found to be under the *administrative authority* of the Internal Revenue Laws because of his voluntary application for a gaming license and participating in commerce involving gaming machines, the court found that IRC §□7203, in and of itself, was *meaningless* unless it was

[2] The Menks Court is not nearly the only Court to rule on this exact issue. As will be shown in the memorandum, many Courts have held that the violation is *outside* the penalty statute. The penalty statute — § 7202 — cannot be violated, but rather only imposes the *penalty* for failure to do an act *imposed by the Title*.

coupled in the *indictment* with both the statute that imposed the *tax* that was not reported by filing and the statute that made the defendant *liable* for the tax. In other words, for the court to have subject matter jurisdiction for a misdemeanor prosecution of failure to file under IRC §7203, the *indictment* must include both the statute imposing the specific tax to be reported and the statute that makes the individual liable to pay the specific tax for the taxable income activity. As the Menks Court found in this 36-year-old binding opinion, *"It is IMPOSSIBLE to determine the meaning or intended effect of any one of these sections without reference to the others."* What was *impossible* for the Menks Court 36 years ago would be similarly *impossible* for this Court. Absent the imposing and liability statutes, the *nature and cause* of the accusation has not been stated and under the *Apprendi doctrine* the indictment is void on its face.

19. Clearly, the grand jury was NOT made aware of the requirement of a statute that imposed a tax or made the defendant liable for a tax. The Menks doctrine was WITHHELD from the grand jury in what can be nothing more than obstruction of justice through withholding evidence for the sole purpose of obtaining an indictment for a non-existent crime. The indictment, on its face, must be found to be a nullity.

20. Under Apprendi v. New Jersey, 530 U.S. 466 (2000), the indictment must clearly state the *nature and cause of the accusation*. The indictment, on the fifteen (15) §7202 counts, fails completely to state the nature and cause of the accusation because it alleges that the defendant violated a *penalty statute*. On the other 12 counts the indictment alleges an act that cannot by ACT OF CONGRESS be prosecuted for a claim filed under the internal revenue laws. Congress included an *injunction* against using the False Claims Act to prosecute claims filed under the

internal revenue laws. The indictment also fails to offer any set of facts that would support the contention that the defendant KNOWINGLY filed a *false claim* as that term is *specifically defined* in the False Claims Act codified at 31 USC §3729. The indictment leaves to speculation and imagination what the alleged crime really was because the requisite facts to meet the threshold elements of the crime are completely absent. Therefore, pursuant to Apprendi, the indictment, on its face, is a nullity, and must, therefore, be QUASHED.

PRAYER

For the reasons stated hereinabove, the defendant prays that this Court find that the indictment is *fatally defective*, and must be, and therefore is QUASHED.

For the reasons stated hereinabove, the defendant prays that this Court find that it is in want of personal jurisdiction over the defendant and in want of subject matter jurisdiction over the fact issues and codes sections cited within the indictment.

Defendant prays that this Court **DISMISS** all counts with prejudice.

Respectfully submitted,

Arch C. McColl III
Attorney for Richard M. Simkanin
McColl & McColloch
2000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4718
214-979-0999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document were served by hand delivery, facsimile transmission and/or by Certified Mail (RRR) to:

Mr. David Jarvis
U.S. Department of Justice
Assistant United States Attorney
Northern District of Texas, Ft. Worth Division
801 Cherry Street, 17th Floor
Forth Worth, Texas 76102

Arch C. McColl II