

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

UNITED STATES OF AMERICA  
plaintiff

v.

Kent E Hovind  
Defendant- pro se

§  
§  
§  
§ Case No. 3:06 cr 83/mcr  
§ Case No. 3:10 cv487/mcr/emt  
§  
§

MEMORANDUM OF LAW TO SUPPORT DEFENDANT'S  
MOTION TO VACATE, SET ASIDE OR CORRECT A SENTENCE

Now comes Kent E Hovind, defendant, to file this Memorandum of Law to Support Defendant's Motion to Vacate, Set Aside or Correct a Sentence under 28 U.S.C § 2255 and would show the court the following, to wit:

Ground one. The Hovind Grand Jury Indictment was filed with the U.S. District Court charging that taxable income was not properly reported and income taxes paid concerning the named Defendant. This means that the Grand Jury was informed of the deficiencies in income reporting and income taxes paid. Defendant's attorney provided ineffective assistance of counsel in violation of Amendment VI in that he did not question or discover that Counts 1-12 in the Grand Jury Indictment had a missing essential legal element. The Grand Jury Indictment was Constitutionally defective and must be struck down. Before there can be a violation of §7202 there must be a tax liability that is proven by an official tax assessment record (Form 4340) on which to base the charges. To have a legal tax assessment, a certified individual or company assessment record must be prepared by the government on or with a form 4340, including a form 2866- Certificate of Official Record. This was not done. Congress has established methods in the Code that the IRS must follow before it is entitled to collection. Bilzerian v. U.S., 887 F.Supp. 1509, reversed 86 F.3d 1067. The

IRS Commissioner is as bound as the taxpayer by the terms of the Internal Revenue Code. Maxwell v. Cambell, 205 F.2d 461; Philidelphia & Reading Corp. v. U.S., 944 F.2d 1063.

Neither the public defender for the first 14± days nor the paid attorney Alan Ritchey questioned the bad faith of the Government in charging counts 1-12 when there was no evidence a tax was due or a violation had occurred. No Warrant should have issued as there could not have been an Oath or affirmation of a tax due and owing. Defendant's 4th Amendment rights were violated.

Section 6201 of the Internal Revenue Code provides the authority for assessment. Until a proper assessment has been made, the IRS is not entitled to collect a tax administratively. The lien provisions of the Code depend upon the making of a demand for payment, and there cannot be a demand for payment or a charge that no payment was made as in this instant case if there is no assessment. See I.R.C. 6303(a) and 6321. The IRS is precluded from administratively collecting a presumed tax liability without a valid assessment.

Section 6203 provides that the "assessment shall be made by recording the liability of the taxpayer in the Office of the Secretary in accordance with the rules or regulations prescribed by the Secretary." The regulations on Procedure and Administration further provide as follows: "the assessment shall be made by an officer signing the summary record of assessment. The summary record, through the supporting records, shall provide the identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of assessment ... The date of the assessment is the date the summary record is signed by the assessment officer." Treas. Reg. 301.6203-1.

Historically the document reviewed and signed by the assessment officer has been Form 23C. Today Form 23C has been replaced by a computer-generated report known as Form RACS 006 and Form 23C is used (only) when the computer is unavailable. However, even though an assessment officer signs the RACS 006, the assessment officer does not have firsthand knowledge as to whom the tax was assessed against.

In 1996 the GAO (GAOIT-AIM96-56) confirmed that the RACS 006 does not contain information from the master file (IMF) of an alleged taxpayer. That testimony by the GAO states that the information contained in the RACS 006 is based on Treasury Schedules, not individual taxpayer accounts.

The regulations allow the taxpayer to challenge alleged errors in the assessment process and request a copy of certain parts of the assessment record. The courts have generally held that the IRS need not provide a Form 23C but have held that the IRS may submit Certificates of Assessment on Form 4340. The courts have held that these Certificates on Form 4340 "are presumptive proof of a valid assessment" if certified by a Certificate of Official Record on Form 2866.

The Hovind Grand Jury Indictment was filed with the U.S. District Court charging taxable income was not properly reported and income taxes were not paid concerning Defendant. This means the Grand Jury was informed of the deficiencies in income reporting and income taxes paid with no proper evidence or no proper factual or legal essential elements.

The Defendant did not receive the evidence documents which should have included certificates of assessments, payments and Forms 4340 (Rev. 01-2002) and Form 2866. To date there have been no Forms 4340 or Forms 2866 presented. Therefore the Grand Jury Indictment was obtained by fraud violating Defendant's 4th, 5th and 6th Amendment rights.

Without these forms there is no evidence of even a civil tax liability due and owing according to the following Federal Appellate Court cases: Gentry v. U.S., 962 F.2d 555; Johnson v. U.S., 990 F.2d 41; Huff v. U.S., 10 F.3d 1440; Geiselman v. U.S., 961 F.2d 1; Johnson v. U.S., 123 F.3d 700; Stallard v. U.S., 12 F.3d 489; Howell v. U.S. 164 F.3d 523.

The courts have upheld that a person cannot be charged criminally until there has been a valid tax assessment. "under no circumstances may the trial court usurp this right (valid tax assessment) by ruling as a matter of law on an essential element of the crime charged." U.S. v. England, 347 F.2d 425 (explanation added).

There is no doubt that a valid tax assessment and proof thereof was an essential element of the case. Banks v. U.S., 204 F.2d 666 reaffirmed 223 F.2d 884.

Since the government did not scrupulously observe the rules or procedures neither the indictment nor the warrant should ever have issued and Defendant's attorney was negligent in not demanding that these charges be struck down by the court. The Supreme Court has ruled "A government agency being the prosecutor must ... scrupulously observe rules and procedures which it has established, and when it fails to do so, its actions cannot stand and the courts will strike it down." United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Several courts have upheld the Accardi Doctrine since 1954 making it an accepted principle of law with extended usage in many applications. U.S. v. Heffner, 420 F.2d 809.

Counts 1-12 have the missing essential element of a tax liability. The regulations require that the assessments be signed by an assessment

officer. March v. Internal Revenue Service, 335 F.3d 1186; Cert. denied, 541 U.S. 1031. In the absence of Forms 4340 and 2866 and following proper procedure there can be no tax due and owing yet neither attorney demanded that these documents be produced nor objected when these counts went before the jury without these documents. It is never within the prosecutor, grand jury or the court to make determinations premised on incorrect legal standards. Koon v. U.S., 135 L. Ed 2d 392 (1996); U.S. v. Castro, 129 F.3d 226. Counts 1-12 should never have been charged and should have been struck down by the court.

Defendant had ineffective assistance of counsel in that neither attorney defended Defendant's constitutional rights by challenging this manifest miscarriage of justice.

To be sufficient, an indictment must allege each element of the offense; if it does not, it fails to charge that offense. U.S. v. Cabrera-Teran, 168 F.3d 141 at 143 (5th circ. 1999); U.S. v. Guzman-Ocampo, 236 F.3d 233 at 236 (5th Cir. 2000). The Defendant in this instant case was charged with crimes that do not exist under the introduction and statutes cited in the indictment and therefore, all counts are fatally defective. Stirone v. U.S., 361 U.S. 212.

"it is not enough that defendant should be prosecuted for violating a particular statute; rather, the indictment must also allege every element of the offense. Only in this way is any assurance furnished that the grand jury found probable cause to believe the defendant in fact committed acts constituting the offense in question." "The failure of indictment to allege all elements of the offense may not be cured by evidence or instructions at trial, nor by ... a bill of particulars, and indictment may not be actually

or constructively amended by adding material allegations to the offense charged or of another offense." Honea v. U.S., 334 F.2d 798 at 803-04 (1965).

With an illegal Grand Jury Indictment obtained with no evidence of even a civil federal income tax liability the court is deprived of jurisdiction to even try the case. The improper inclusion of these counts violated Defendant's Constitutional rights and prejudiced Defendant and greatly undermined the proper functioning of the adversarial process to the point where the trial cannot be relied on as having produced a just result.

The grand jury indictment was defective depriving the court of jurisdiction to even try the case.

Ground Two. Counts 13-57 of the Grand Jury Indictment are Constitutionally defective in that they are missing essential legal and factual elements. Defendant was charged with violating Title 31 U.S.C. §§ 5324(a)(3) and 5324(d). These statutes have three essential elements which are:

1.) The duty of an individual to inform the bank or the IRS that he is engaging in multiple but related transactions to avoid the CTR filing requirement.

2.) There were multiple but related transactions performed by the individual.

3.) The multiple structured related transactions were not filed with the bank or the IRS by the individual.

The Hovind Indictment does not charge item 1.) and 3.). These are missing essential legal and/or fact elements that must be specifically charged in the indictment but were not, causing the court to lack jurisdiction.

In addition to the missing essential elements, the statute and regulations of the Act itself is fatally flawed and void.

The statute and regulations implimenting the Act do not require individuals to inform either their banks or the IRS that they are engaging in multiple but related transactions in order to avoid the CTR filing requirement. The relevant statute authorized the Secretary to impose such a duty, his implimenting regulations did not do so. U.S. v. Varbel 780 F.2d 758 at 762; U.S.v. Murphy, 809 F.2d 1427 at 1431. Without the implimenting regulations the statute by itself, does not have the force and effect of law. U.S. v. Merskey, 361 U.S. 431; California Bankers Assn. v. Schultz, 416 U.S. 21; U.S. v. Reinis, 794 F.2d 506; U.S. v. Two Hundred Thousand Dollars, 590 F.Supp. 866.

Failure to charge all three elements should have caused the counts to be dropped from the indictment, See Hamling v. U.S., 418 U.S. 87, 117, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590; U.S. v. Hooker, 841 F.2d 1225; U.S. v. Pupo, 841 F.2d 1235; U.S. v. King, 587 F.2d 956 at 963; U.S. v. Kurka, 818 F.2d 1427 at 1431.

A criminal defendant is entitled to a legally sufficient indictment. U.S. v. Napue, 843 F.2d 1311; U.S. v. Hinkle, 673 F.2d 1154 at 1157 which must contain all language found in the charging part of the instrument. (emphasis added). U.S. v. Smith, 838 F.2d 436; U.S. v. Conlon, 661 F.2d 235 at 238; U.S. v. Hess, 124 U.S. 483 at 487; U.S. v. Rivera, 837 F.2d 906 at 918.

"in a criminal prosecution of one charged with the commission of a felony, the defendant has the absolute right to a jury determination upon all essential elements of the offense" (emphasis added) U.S. v. England,

347 F.2d 425. "It is necessary that the Government prove to the jury beyond a reasonable doubt every element of the offense charged." (emphasis added) Christoffel v. U.S. 338 U.S. 84, 89, 69 S. Ct. 1447, 93 L.Ed. 1826.

The failure of the indictment to allege a federal crime cannot be cured by any means. U.S. v. Spinner, 180 F.3d 514 at 516; U.S. v. Tran. 234 F.3d 798 at 806.

Failure to include all essential elements in the indictment creates an insufficiency which is not cured by a mere citation of the law nor by a charge to the jury. U.S. v. Hooker II, 841 F.2d 1225. The Hooker court also found that the failure to include all elements in the indictment is "fatally defective and that the conviction thereon must be reversed." *id.* at 1226.

Neither attorney objected strenuously to this fatal defect nor pointed out that 31 USC § 5324(a)(3) does not require defendant to fill out any forms but only puts this requirement on the bank not the defendant.

This fatal defect in the Indictment deprived the court of jurisdiction to even try the case. The improper inclusion of these counts violated Defendant's Constitutional rights and prejudiced Defendant and greatly undermined the proper functioning of the adversarial process to the point where the trial cannot be relied on as having produced a just result.

Ground Three. The Defendant was charged in count 58 of the Grand Jury Indictment with violation of title 26 USC § 7212(a) which involves attempts to interfere with administration of Internal Revenue Laws by corrupt or forcible interference. The statute then refers to corruptly or by force or threats of force as the essential elements. Seven of the overt acts listed in the Count 58 are outside the charging elements of the offense and

constitute overreaching and overcharging. The overt acts which were charged yet are not proscribed acts but rather acts protected as legal Constitutional rights of Defendant include:

- a. Filing a petition for bankruptcy...
- b. Filing a false and frivolous lawsuit against the IRS...
- c. Filing a complaint for a preliminary injunction...
- e. Filing a false complaint against investigation IRS agents with the Treasury Inspector General for Tax Administration;
- f. Filing a criminal complaint against investigating IRS special agents...
- g. Destroying records..
- h. Paying his employees cash...

When a prosecutor charges activities not proscribed by statute in the grand jury indictment, the Defendant becomes illegally indicted and charged and the court lacks jurisdiction to try the case. Overcharging allows the Grand Jury to find probable cause for an overt act that is not part of the charging offense or proscribed by criminal statute. See. U.S. v. Murphy, 80 F.2d 1427. The indictment in this case is Constitutionally defective and must be ruled as void. When an indictment fails to include an essential element of the offense charged, it thereby fails to charge any Federal offense, and a conviction under the indictment may not stand. U.S. v. Hooker, 841 F.2d 1225; U.S. v. Pupo supra at 1239. The indictment should only lay out elements of the charge and factual circumstances underlying them. U.S. v. Morris, 623 F.2d 145 at 149; U.S. v. Nunez, 180 F.3d 227 at 230; U.S. v. White, 258 F.3d 374; U.S. v. Rivera, 837 F.2d 906 at 918.

In Stirone v. U.S. 361 U.S. 212 at 218, the indictment charged interference with sand imports, but the government only had evidence regarding the interference with steel imports. This was an essential missing element. An error of that constitutional magnitude cannot be deemed harmless. Stirone, supra at 217. The enlargement of an indictment breaches constitutional guarantees. Stirone supra; U.S. v. Harrill 877 F.2d 341. The defendant in this instant case has had his 5th and 6th Amendment rights violated which causes an extreme prejudice resulting in harmful error.

An indictment is only deemed constitutionally sufficient if it sufficiently apprises the accused of what he must be prepared to defend against. Russell v. U.S. 369 U.S. 749. at 768 n. 15; U.S. v. Schwab, 61 F.Supp. 2d 1196. The concern is whether a defendant has "a clear understanding of each of the charges against him." U.S. v. Edmonson, 962 F.2d 1535 at 1542; U.S. v. Schwab, supra. It is never within the discretion of the prosecutor, grand jury or the court to make determinations premised on incorrect legal standards. Koon v. U.S. supra; U.S. v. Castro supra.

The Hovind Indictment also has the missing essential elements being:

1. The specific or particular names of persons allegedly threatened, intimidated, obstructed or impeded were not listed in the Hovind indictment.

2. The specific or particular letter or communication was not referred to in the Hovind indictment. In order to allow the accused to prepare a defense the specific facts must be set forth in the indictment, with a reasonable particularity of time, place and circumstances. U.S. v. Cruishank, 92 U.S. 524; Russel v. U.S. 369 U.S. 749 at 768.

When IRS-CID Special Agent Scott Schneider was questioned on the witness stand he added the detail that he felt "threatened" when Defendant "prayed for him on the radio." This amounted to a constructive amendment to the indictment. When there is a constructive amendment during trial as there was in this instant case, reversal is automatic or per se because the defendant may have been convicted on grounds not charged in the indictment. U.S. v. Young, 730 F.2d 221 at 223; Stirone v. U.S., 361 U.S. 212 at 218; U.S. v. Nunez, 180 F.3d 227 at 230. Amendment by the court or jury instruction is per se fatal. Russell, supra; Ex Parte Bain, 121 U.S. 1; U.S. v. Rivera, supra at 919. The Grand Jury indictment did not name Agent Scott Schneider as the one "threatened" nor did it say what the alleged threat was nor how a "prayer on the radio" became a threat. If the prosecutor plans to use offenses not charged in the indictment he or she must present those particular facts to the grand jury. U.S. v. Rivera, supra at 920. Constructive amendments are typically found where the government offers proof of the offenses or transactions not even mentioned or charged in the indictment. U.S. v. Berger, 224 F.3d 107.

The failure to charge an essential element of a crime is by no means a mere technicality. See U.S. v. King, 587 F.2d 956 at 963; U.S. v. Kurka, 818 F.2d 1427 at 1431. Therefore the Petit Jury instructions must follow the indictment which must legally include each essential element of the offense charge or it violates defendant's 5th amendment rights. The prosecutor must prove each and every essential element of an offense per jury instructions. Since the real issue of the offense was not mentioned or proved, the prosecution failed to prove each and every essential element and the Defendant in this case is not guilty of the offense by any standard of review.

The Petit Jury had no chance to correctly decide a just verdict because the law presented to them was erroneous, incomplete and totally lacking along with having incorrect, false and illegal law presented or offered in place of the correct and valid law.

Allowing a conviction to stand on acts protected by the Constitution such as filing lawsuits or complaints would have an adverse "chilling effect" on others attempting to exercise their constitutional right that the courts cannot allow to stand.

Neither attorney objected or challenged these numerous defects causing a violation of defendant's Constitutional rights and so prejudiced the judicial process that the trial results cannot be relied on as having produced a just result.

Ground Four. Defendant's Constitutional rights were violated in that due process was not scrupulously observed in the arraignment, trial, sentencing, forfeiture and other aspects of the criminal proceedings causing a "Manifest miscarriage of justice" where "The evidence is so tenuous that a conviction would be shocking." U.S. v. Bender, 290 F.3d 1279 at 1285 (11th circ. 2002). Defendant's counsel was deficient and ineffective in not vigorously objecting to or challenging the following errors:

A. There was never a Complaint and supporting Affidavit on which to base the charges. Rule 3 F.R.Crim.P. states, "The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge". With no complaint made under oath no arrest Warrant should have issued in violation of Rule 4 which states, (a) Issuance. if the complaint or one or more affidavits filed with

the complaint established probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it." There was no probable cause to arrest since there was no complaint or affidavit and the issues listed in the indictment were brought before the grand jury under fraud as there was no evidence of a tax due and owing documented by Forms 4340 and 2866 (see arguments under Ground One above). Also, alleged non-payment of taxes should have been a civil action first before any criminal proceedings were begun. Probable cause to arrest can only exist in relation to criminal conduct and civil disputes cannot give rise to probable cause. Amendment IV; Allen v. City of Portland, 73 F.3d 232 at 233; Stevens v. Rose, F3d 880 at 880-1. Defendant's use of Constitutionally protected rights such as filing suits or complaints cannot be converted into a crime. Miller v. U.S., 230 F.2d 486 at 490.

In addition, proper procedure required in Rule 5(d)(1)(A) was not followed or questioned by Defendant's attorney.

Rule 5(d)(1)(A) states,

"(d) Procedure in a Felony Case. (1) Advice, if the defendant is charged with a felony, the judge must inform the defendant of the following: (A) the complaint against the defendant, and any affidavit with it;" The government did not follow these rules as no complaint or affidavit were ever produced. Failure to follow due process deprives the court of jurisdiction. Merritt v. Hunter, 170 F.2d 739 and violates defendant's 4th, 5th and 6th Amendment rights. "A government agency being the prosecutor must ... scrupulously observe the rules or procedures which it has established, and when it fails to do so, its actions cannot stand

and the courts will strike it down." (emphasis added) U.S. ex rel. Accardi supra.

It would be the height of hypocrisy for the government to accuse and arrest defendant for alleged failure to follow the bewilderingly complex Internal Revenue Code (IRC) containing thousands of pages, much of it written in "legalese" that even many lawyers struggle to understand when they did not follow the relatively simple Rules required of them in the F.R.Crim.P. This is especially true in light of the fact that IRS-CID Special Agent Scott Schneider clearly admitted at trial that defendant had written to him numerous times asking for clarification of both his and the Church ministry's obligations under the IRC yet none of defendant's letters or questions were answered!

As the 11th Circuit articulated, there must be an "incessant command of the court's conscience that justice be done in light of all the facts." Griffin v. Swim-Tech Corp., 722 F.2d 677, 680. Justice was certainly NOT done in this case!

The indictment was obtained under fraud and cannot be used as a substitute or excuse for the government bypassing Rules 3, 4 and 5.

Defendant's attorney was negligent in not pointing out these errors in due process and stopping the arraignment until these Rules were followed. Arraignment is not a ministerial proceeding. Kent v. U.S. 383 U.S. 541, 16 L.Ed 2d 84 S.Ct. 1045 (1966). In Federal Constitutional law an arraignment is necessary to trial and is so critical a stage in a criminal proceeding that denial of due process during arraignment requires reversal even if no prejudice was shown. Hamilton v. Alabama 368 U.S. 52.

Failure to follow due process deprives the court of jurisdiction to try the case. Merrit v. Hunter, supra.

B. Defendant's attorney did not vigorously object at arraignment when Defendant made a jurisdictional challenge and the Magistrate Judge made the decision to ignore the challenge and change Defendant's plea without consulting an Article III Judge. Since the court indeed lacked jurisdiction to proceed any judgments entered are void. Rule 60(b)(4); New York Life v. Brown, 84 F.3d 137; Sea Land Service Inc. v. Ceramica Europa II Inc. 160 F.3d 849. Defendant's attorney was negligent in not demanding an answer to the jurisdictional challenge. There is no time limit to challenge jurisdiction. Government of the Virgin Island v. Williams, 892 F.2d 305; Carter v. Fenner, 136 F.3d 1000 at 1006-7. Now, as a pro se defendant, Defendant renews his jurisdictional challenge. The magistrate's decision to ignore defendant's challenge without consulting an Article III judge is itself void and the court was powerless to enter it. VTA, Inc. 597 F.2d 224; New York Life supra at 139; Williams v. New Orleans Public Serv. Inc. 782 F.2d 1088 (11th circ. 1990).

The specific reasons for the jurisdictional challenge are not at issue for this point but the fact that the Magistrate Judge decided to ignore the issue and change defendant's plea over his repeated objections without first consulting an Article III Judge is. Since defendant was arrested on Church ministry property in Escambia County Florida and not while committing a crime on any Federal property and was taken to the Federal courthouse against his will in handcuffs this obvious "subornation of false muster" cannot be construed as an initial or general appearance where defendant specifically or by default waived any Constitutional rights.

Defendant was Shanghaied into the court's presence against his will. The defendant's counsel was negligent in not demanding an interlocutory appeal or suspensive appeal or any other relevant artful method available to his craft to stop the arraignment process until the issue was settled and defendant was afforded due process.

The court should not have allowed this grave miscarriage of justice and must correct it now pursuant to Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238; United States v. Beggerly, 524 U.S. 38 (1998). Should a judge act in any case in which he does not have subject-matter jurisdiction, he is acting unlawfully, U.S. v. Will, 449 U.S. 200, 216; Cohens v. Virginia, 19 U.S. (6 Wheat) 264 and without any judicial authority. Since a void order has no legal effect there can be no time limit within which to challenge the order or judgment.

Defendant, not being trained in criminal law, could not reasonably have known that his public defender's performance was deficient at the time or that rules and procedures were not being "scrupulously observed." See Accardi supra.

C. Defendant had ineffective assistance of counsel when neither attorney challenged the grand jury's missing essential legal element of 'willfulness' in all 58 counts of the Hovind indictment or in trial. "Willfulness for purposes of criminal law requires the government to prove that the law imposed a duty on the defendant, that the defendant knew of the duty, and that he voluntarily and intentionally violated that duty." Cheek v. U.S., 498 U.S. 192. Neither attorney challenged the fact that the indictment did not allege nor did the government prove at trial any willful violation of any of the charges. "an essential element of willful is that

it must be motivated or prompted by a bad faith or evil intent." U.S. v. Murdock, 290 U.S. 389; Felton v. U.S., 96 U.S. 649. The government did not allege nor prove at trial any bad faith or evil intent yet neither attorney objected vigorously to this grave miscarriage of justice. Their ineffective assistance of counsel resulted in a trial that cannot be relied on as having produced a just result.

D. Defendant's counsel was further ineffective during and after trial on the following issues:

1. Attorney Ritchey did not strenuously object or measure up to the standard level of competent representation for a professional attorney during the questioning of IRS-CID Agent Scott Schneider. Agent Schneider admitted under oath during questioning that there were pages missing from defendant's Individual Master File (IMF). These particular pages state clearly that defendant is NOT a tax protestor and owes no tax. Attorney Ritchey should have taken vigorous action against the government for tampering with, withholding or falsifying evidence and demanded a mistrial at that point but he did not. Defendant, not being trained in criminal law and relying on his paid attorney for a vigorous defense could not reasonably have known all the remedies at law available to prevent this grave miscarriage of justice.

During trial the government offered the 700± page copy of defendant's Individual Master File as evidence that defendant had used the Freedom of Information Act (FOIA) to hinder the IRS investigation and that it had taken lots of time and resources for the government to answer defendant's requests. Attorney Ritchey should have pointed out to the court and to the jury that it is defendant's legal right to use the FOIA process to obtain

government records about himself, especially in light of the fact that Agent Schneider admitted that he had not answered any of defendant's letters or questions over a period of several years. Ritchey should also have pointed out that defendant offered to pay for each and every FOIA request and indeed did pay approximately \$146 for the very document they were entering as evidence!

Agent Schneider's admission on the witness stand that he knew pages were missing is demonstration that the prosecution was "vexatious, frivolous or bad faith" Aisenberg v. Hillsborough, 325 F. Supp. 21, 1366.

2. Attorney Ritchey did not inform defendant that his first loyalty was to the court as an officer of the court. During the questioning of Agent Schneider Ritchey was clearly pointing out that the IRS had not followed the law or their procedures before, during and after the 2004 raid on the Church ministry property where \$42,000+ in ministry funds were seized and kept in the IRS-CID safe as potential evidence in a criminal investigation. A few months later a civil tax bill was created for the exact amount seized and the funds were taken from the safe and applied to the civil tax bill that day without following due process as explained above. When the court stopped Ritchey's line of questioning and ordered him "as an officer of the court" to stop that line of questioning defendant noticed an immediate decline in Ritchey's zeal for his defense but did not understand why at the time. Ritchey should have told defendant right then that his first loyalty was to the court and not to defendant who had paid him for a vigorous defense.

Defendant could not reasonably have known that his paid attorney was disloyal, dishonest and working for the government. Ritchey should have

pointed out that his first loyalty was to the court and withdrawn from the case and returned defendant's money. Successfully discrediting the government's main witness would have greatly altered the trial outcome so that petitioner was prejudiced by Ritchey's lack of proper assistance of counsel and the trial cannot be relied on as having produced a just result.

3. Defendant had ineffective assistance of counsel when Attorney Ritchey advised defendant NOT to give a defense at close of trial. He said he was convinced defendant had broken no laws and that the government had not proven their case and, in America, a defendant was innocent until proven guilty beyond a reasonable doubt.

His advice to not give a defense was followed by Defendant and caused great harm in that the jury was deprived of seeing any of the unanswered correspondence sent by defendant to the IRS over a period of several years where all of the charges in the indictment could easily have been answered and the IRS's lack of following due process would have been made clear.

4. Defendant had ineffective assistance of counsel when Ritchey did not strenuously object or follow all available remedies at law in a vigorous defense when the court changed the jury instructions at close of trial. Changing "more than \$10,000" to "less than \$10,000" in the jury instructions misstated the law, violated the FRCrimP and essentially assured a conviction of defendant. Defendant could not reasonably have known all the possible legal options Ritchey should have used to prevent this grave miscarriage of justice to stop the trial process until the issue could be examined and a determination made by a higher authority.

5. At close of trial Attorney Ritchey provided ineffective assistance of counsel when he did not vigorously object to the government asking for

the \$430,000 in "structured funds" to be forfeited to the government even though the evidence at trial clearly showed the funds were earned, deposited and withdrawn in a lawful manner and spent on legitimate ministry bills. There was no fraud involved on the part of defendant nor were any drugs involved in the case yet when Title 21 drug laws were used to "justify" this theft of ministry funds Ritchey did not use all the remedies at law available to stop this grave miscarriage of justice.

6. At sentencing attorney Ritchey did not strenuously object or use all available tools in his craft to prevent the grave miscarriage of justice when a \$604,874.87 alleged 'tax loss' was used to enhance defendant's sentence even though this alleged tax loss was not found by the jury or certified according to the procedures outlined in the IRC as discussed above. He was further negligent in not stopping the grave miscarriage of justice when the court ordered this alleged 'tax loss' to be paid as restitution without due process or certified evidence of a tax due and owing. Defendant is entitled to have all facts found by a jury and to a trial where the government scrupulously observes the rules.

7. Defendant had ineffective assistance of counsel when Ritchey allowed 16 months to go by just to get the trial transcript after it was paid for. This delay caused great harm to the defendant in that appeal could not go forward without this transcript. He also did not demand a certified correct copy of the transcript and a certified correct copy of the sound recording to see if a violation of 28 USC §753(b) had occurred nor did he strenuously object when it was discovered that the transcript was NOT accurate but had been altered even though there were (and still are) at least 25 witnesses willing to testify that what they heard and saw in court does not match the transcript. Many swore out affidavits to this effect.

Ritchey should have filed a Rule 60(b)(3) motion or other appropriate motions to have this issue examined by those with authority to judge but he did not. His failure caused a grave miscarriage of justice in that the Appeals courts may not have had an accurate record of the trial on which to base their decision. His failure to use every means available to his trade to prevent the grave miscarriage of justice that occurred may have allowed a conviction to stand that would be shocking had it been made known.

8. Attorney Ritchey provided ineffective assistance of counsel when he did not object or pursue all remedies at law to stop the grave miscarriage of justice that occurred when the court ruled that the Church ministry properties actually belonged to defendant even though 10 of them had NEVER been in defendant's name and the 2 other properties had been deeded over into ministry trusts about 8 years earlier! This redesignation of property ownership was apparently done for the purpose of allowing the government to seize them. Ritchey did not vigorously object or use all his lawyer skills to prevent this grave injustice when this action was done with no trial or even a hearing and this issue was not part of the criminal trial nor found by a jury. This action was done over the clear objections of the trustee whose name is on the deeds and without giving those who had sworn out affidavits about the issue any opportunity to testify.

Attorney Ritchey did not strenuously object or use other means available to competent attorneys to prevent this grave miscarriage of justice.

9. The public defender first assigned to defendant provided ineffective assistance of counsel by not objecting when no consent forms were offered or signed to allow the arraignment to proceed before a Magistrate Judge.

Without this express consent the magistrate judge lacks authority to proceed. Peretz v. U.S., 501 U.S. 923. This is especially important after defendant challenged the jurisdiction and the magistrate made the determination to ignore defendant's challenge and change defendant's plea over his repeated objections without consulting an Article III Judge.

A Magistrate Judge's judgment without consent is a nullity. Estate of Connors v. O'Conner, 6 F.3d 656 at 658; Binder v. Gillespie, 172 F.3d 649; Aldrich v. Bowen, 130 F.3d 1364 at 1365; Gomez v. Vernon, 255 F.3d 1118 at 1126. Consent will not be inferred from silence or conduct of parties; In re Marriage of Nasca, 160 F.3d 578; Roell v. Withrow, 538 U.S. 580 (2003). "the magistrate's criminal trial jurisdiction depends on the defendant's consent." Peretz supra. There is no time limit to challenge jurisdiction so defendant hereby renews his jurisdiction challenge. The arraignment should have stopped at that moment of challenge. Defendant's attorney was ineffective, negligent and incompetent in that he allowed the court to proceed and try the case without first demanding that this grave miscarriage of justice and failure to follow due process be corrected.

An arraignment is not a ministerial proceeding. In Federal Constitutional law an arraignment is a critical stage in a criminal proceeding. Hamilton v. Alabama, 368 U.S. 52; Johnson v. U.S., 333 F.2d 3771. An arraignment is a condition precedent to a trial in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice. Hamilton v. Alabama, supra; U.S. v. Leonti, 326 F.3d 1111. Arraignment is an indispensable condition to trial itself, the preliminary state where the accused is informed of the indictment and pleads to it, thereby formulating the issues to be tried.

Anderson v. U.S., 352 F.2d 945. An arraignment accordance with Rule 10 is intended to be a safeguard for due process and failure to observe this safeguard amounts to denial of due process and the court is deprived of jurisdiction. Merritt v. Hunter, 170 F.2d 739. Arraignment in a federal criminal prosecution is a vital part of the criminal process. McConnell v. U.S. 375 F.2d 905.

The Court at the arraignment must determine whether it has personal and subject-matter jurisdiction concerning this case before any other determinations are made. This critical step cannot be performed by a non-Article III judge in an Article III court involving a felony case. The magistrate proceeded to conduct the arraignment proceeding and made final determinations and rulings as they arose. There is no indication in the record of the existence of communication between the Magistrate and an Article III Judge or of the method of any such communication. We cannot presume, where no evidence exists in the record to support such a presumption; that the Article III Judge was playing an active role in making rulings as they were made. Fowler v. Jones, 899 F.2d 1088 (11th circ. 1990).

The Fifth Circuit Court of Appeals in the case U.S. v. Johnston, supra ruled that a Magistrate Judge cannot conduct vital criminal felony proceedings even with the consent of the defendant.

In this instant case the defendant was arraigned without the informed consent of the defendant. The Magistrate Judge is not an Article III Judge as demanded by the U.S. Constitution. The appointment of a magistrate "was conditioned upon the defendant's express written consent." Peretz supra.

The legislative history of the statute (28 USC § 636(b)(3)) also emphasizes the crucial nature of the litigant's consent. See H.R. Rep. No. 96-287, p. 20 (1979) (Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent")(emphasis added)

There is no Article III problem with the defendant's consent. No written consent to be arraigned before a U.S. Magistrate Judge was given by defendant in this case. The legal result is that the alleged proceeding never occurred or happened. When jurisdiction is void, any subsequent criminal proceedings have no validity and are also necessarily void. Any resulting final orders from this court, in this case, are void and of no effect and the defendant must be immediately released from custody, the case vacated, all fines, penalties and confiscated property returned, all liens removed and the record expunged or a grave miscarriage of justice will have occurred.

A criminal defendant has a "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." Thus, harmless-error analysis does not apply in a felony case. In re Morrissey v. Arnold, 717 F.2d 100 at 102; Gomez v. U.S., 104 L.Ed. 2d 923; Government of the Virgin Islands v. Williams, 892 F.2d 305 at 309. Defendant had ineffective assistance of counsel in that they did not vigorously object to this grave miscarriage of justice. The trial cannot be trusted to have produced a just result.

#### EVIDENTIARY HEARING

Title 28 USC § 2255(b) provides, in pertinent part, that "unless the files and records of the case conclusively show that the prisoner is

entitled to no relief the court shall ... grant a prompt hearing thereon" Because the "files and records of the case" do not show conclusively that the prisoner is entitled to no relief, Defendant prays this Honorable Court to grant a prompt evidentiary hearing unless this motion is granted, making one unnecessary.

#### APPOINTMENT OF COUNSEL

Defendant Hovind respectfully moves this Honorable Court to appoint zealous "assistance of counsel" in this case should this motion not be granted.

#### CONCLUSION

Therefore, in light of the above facts, it is prayed that this Honorable District Court grant this 2255 Motion and enter an order that the case be overturned, defendant granted immediate release from federal custody, the case vacated and expunged, all fines, penalties and confiscated property and monies returned and all liens removed.

Defendant further requests that Findings of Fact and Conclusions of Law be included as determined by an Article III Judge with any rulings on each of the issues above.

Defendant is a pro se litigant and the court should afford him liberal construction and the benefit of such review recognizing that pro se defendants cannot be expected to navigate the legal system as clearly as a trained lawyer would. Haines v. Kerner, 404 U.S. 519; Grullon v. U.S., 2004 WL 1900340.

VERIFICATION

IT IS HEREBY Certified that the facts in the foregoing pleadings are true and correct under penalties of perjury to the best of my knowledge and belief.

Respectfully submitted this 9<sup>th</sup> day of December, 2010

Kent E Hovind

Kent E Hovind pro se

#06452-017

Federal Satellite Camp

2650 Hyw 301 S.

Jesup, GA 31599

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of this Amended Motion by a Person in Federal Custody to Vacate, Set Aside, or Correct Sentence Under 28 USC § 2255 and this MEMORANDUM OF LAW TO SUPPORT DEFENDANT'S MOTION was mailed to the government's attorney below on the 9<sup>th</sup> day of December, 2010.

Kent E Hovind

Kent E Hovind

United States Attorney  
21 E. Garden St.  
Pensacola, FL 32502