

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF LOUISIANA  
3 SHREVEPORT DIVISION

4 UNITED STATES OF AMERICA \* Criminal Action  
5 No. 06-50164  
6 VERSUS \*  
7 Shreveport, Louisiana  
8 TOMMY K. CRYER \* July 9, 2007  
9 \* \* \* \* \*  
10

11 VOLUME I  
12 TRANSCRIPT OF TRIAL  
13 BEFORE THE HONORABLE S. MAURICE HICKS, JR.  
14 UNITED STATES DISTRICT JUDGE, and a jury.

15 APPEARANCES:

16 For the Government: AUSA Earl M. Campbell  
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PROCEEDINGS PRODUCED BY MECHANICAL STENOGRAPHY AND TRANSCRIBED  
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MORNING SESSION

JULY 9, 2007

(Court called to order with defendant  
present at 8:39 a.m.)

THE COURT: Good morning. Please be seated. When we  
left following Friday's hearing, there were some developments  
that the Court was made aware of on Friday afternoon.  
Mr. Campbell, where are we this morning?

MR. CAMPBELL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CAMPBELL: Just to kind of recap what's happened,  
basically, late Friday afternoon the Government reassessed the  
case and it was -- a decision was made at that time to proceed  
on the lesser included offenses. And so the issue became,  
since the Court had dismissed those pursuant to the defense's  
motion to dismiss for -- I think the way the motion was styled  
was for duplicity because we charged the lesser included  
offenses as separate offenses. The question is: Where does  
that stand as far as the indictment? And it is the  
Government's contention that the two counts of the superseding  
indictment that were left, the language does provide all of the  
essential elements to plead the lesser included offenses for,  
basically, 7203, a misdemeanor failure to file or pay taxes.  
And because since the language of the indictment plead that,  
certainly the defendants were on notice that the lesser

1 included offenses would be a part of this trial, because in  
2 their motion they certainly plead it or certainly argue that  
3 those counts were lesser included offenses, and the Court in  
4 its order stated that it would present those offenses as lesser  
5 included offenses. The defense certainly was on notice that  
6 part of this trial would be those charges; and, therefore, it  
7 is the Government's position that, at this point, to proceed  
8 forward on the lesser included offenses of 7203, failure to  
9 file and pay taxes. And in support of our posture at this  
10 point, the Government will submit case law to the Court and  
11 Defense Counsel.

12 (Counsel hands document to the Court.)

13 MR. CAMPBELL: And for the record, the cases that  
14 I've just submitted, there's a Supreme Court case, United  
15 States v. Hutcheson. The cite is 312 U.S. 219. And the other  
16 case -- two Fifth Circuit cases: United States v. Quintero,  
17 872 F.2d 107; and United States v. Mitchell, 484 F.3d 762. And  
18 then a case from the Sixth Circuit which is probably about as  
19 on point as it's going to get with this particular issue is  
20 United States V. Perez, 457 F.2d 555.

21 And so for the Government, the issue is, first of  
22 all, does the superseding indictment as it stand allege the  
23 offense of willful failure to file and willful failure to pay  
24 taxes. And when you look at the language of the superseding  
25 indictment, for example, on Count 1, it alleges all of the

1 elements that would be required. You have the willfulness  
2 alleged. You have the failure to file taxes. You have the  
3 applicable deadline date. For example, on Count 1, the  
4 deadline is April 17 because of the weekend where the 15th fell  
5 on that particular year. You have the fact that taxes were  
6 owing, even though that's not a requirement for willful failure  
7 to file. And you also have the same allegations made on behalf  
8 of the trust as well.

9           So when you look at it, you have the willfulness  
10 pleading, you have the fact that they failed to file the return  
11 as required by law, and you also have the applicable deadline  
12 dates. Those are basically the elements of willful failure to  
13 file or pay taxes under 7203. And so Count 1 alleges the  
14 misdemeanor, a lesser included misdemeanor. It's a willful  
15 failure to file and pay taxes. And the same is applicable to  
16 Count 2. And so that certainly puts Defense on notice of those  
17 lesser included offenses.

18           And even though those are two particular counts  
19 reported to plead mis -- I mean, excuse me, felony offenses of  
20 evasion, in Huteson the Court said -- and I'm looking at page  
21 229 pinpoint cite: "In order to determine whether an  
22 indictment charges an offense against the United States,  
23 designation by the pleader of the statute under which he  
24 purports -- purported to lay the charge is immaterial. He may  
25 have conceived the charge under one statute which would not

1 sustain the indictment, but it may nevertheless come within the  
2 terms of another statute." So that certainly is on point in  
3 this particular case here where the indictment purported to  
4 charge a felony, but it also charges misdemeanors.

5           Then you go to the case of United States v. Quintero,  
6 which is a Fifth Circuit case, and here's just the general  
7 proposition -- and I'm looking at page 111 for pinpoint  
8 reference here. The test for determining whether an indictment  
9 is sufficient, quote, is whether it contains the essential  
10 elements of the offense so that it is fairly -- so that it  
11 fairly informs the defendant of the charges against him and  
12 adequately enables the defendant to be protected against  
13 further prosecution for the same offense.

14           And certainly the indictment meets that threshold as  
15 well as far as the lesser included offenses.

16           Now, in Mitchell, which is 484 F.3d 762, this is in a  
17 different context because it's talking about a variance wherein  
18 you have a situation where the evidence at trial was different  
19 than what was alleged in the indictment. So it's kind of  
20 different because at this point we haven't gotten into the  
21 evidence at trial because we haven't taken any testimony yet,  
22 but I think the principle applies here the same. In this case,  
23 and just looking at basis pinpoint -- it's hard to find the  
24 pinpoint on these. I believe around 772. Basically, it talks  
25 about a situation where the government charged the defendant

1 with possession of a firearm during the commission of a drug  
2 trafficking offense. And in this case, the drug trafficking  
3 offense that the government alleged in the indictment was  
4 possession of crack cocaine with intent to distribute. And the  
5 facts of this particular situation is that in this particular  
6 count the defendants broke into a home, they were armed, and at  
7 the time the government alleged that they broke into the home  
8 and stole crack cocaine out of the home. But at trial, the  
9 evidence showed that they did break into the home, that they  
10 did -- that they were armed, but there were no drugs in the  
11 house. So the question is, you had a variance issue. And so  
12 the court resolved this issue by saying even though the  
13 government did not prove the crime alleged in the indictment,  
14 that is, possession of crack cocaine with intent to distribute,  
15 because there were no drugs in the home, the government did  
16 prove the lesser included offense, that is, attempted  
17 possession of crack cocaine with the intent to distribute.  
18 Because when they went into the home, they had every intent to  
19 possess crack cocaine. So the court resolved that by saying  
20 the indictment did plead the lesser included, and that lesser  
21 included offense is included in the greater offense of  
22 possession with intent to distribute crack cocaine. And so the  
23 court said the remedy at that point is basically to modify the  
24 sentence to show that the person was convicted of the lesser  
25 included offense as opposed of the greater offense, which is

1 possession of -- excuse me, possession of a firearm with  
2 intent -- possession of a firearm in furtherance of a drug  
3 trafficking crime, and the crime being possession of crack  
4 cocaine with intent to distribute it. In this case, the  
5 evidence at trial showed that there was no crack there, so the  
6 lesser included offense of attempted possession was proven and  
7 the court modified the sentence accordingly. And then,  
8 finally -- and just with time reference, that's a 2007 case,  
9 May 15 -- excuse me, April 12, 2007 case. That's a pretty  
10 recent case.

11           And then, finally, the last case, it's probably about  
12 as on point as you're going to get, is U.S. v. Paris out of the  
13 Sixth Circuit. And here is an interesting case where the  
14 defendants were charged in the indictment for escape from a  
15 hospital where they were committed. Now, that was the charge  
16 in the indictment. And they were charged under 42 USC 261,  
17 which makes it a crime for anyone to escape from a mental  
18 hospital under federal control where they've been committed.  
19 Now, these particular defendants, they were sent to prison,  
20 they were part of a drug program, and they completed a drug  
21 program as part of their particular sentence. They were sent  
22 to this particular hospital as workers or as volunteers. Okay.  
23 But yet when they got there, they escaped. So the question is:  
24 Did the indictment charge the correct offense? Because they  
25 were never committed there. And so the court determined that

1 the indictment did not charge the correct offense because the  
2 purpose of this statute was to deal with escape by persons who  
3 are committed to the hospital, not people who happen to work  
4 there or may be doing other services there. But the court said  
5 that when looking at the indictment, the indictment charged  
6 another offense, which is escape from a prison or -- escape  
7 from the custody of the institution or officer. And in this  
8 case, the indictment alleged all of the requisite facts as far  
9 as the person escaped from an institution that was in the  
10 control of the Attorney General of the United States. And so  
11 the court looked at that and said: Well, it didn't charge "A"  
12 because "A" was not intended to apply to these facts, but  
13 instead they charged "B," and therefore we're going to let the  
14 conviction stand and sentence them accordingly for "B."

15           And so there you have several examples of cases  
16 that's kind of dealt with this issue. And I think the  
17 overriding issue is: Does the indictment as stand plead the  
18 essential elements of the offense? In this case, it does.

19           Then the next question that comes: What is the  
20 prejudice? Certainly the defense is not prejudiced in the  
21 sense that instead of now of the Government proceeding on a  
22 felony, we're proceeding on a misdemeanor. So in one sense,  
23 the Government's position inured to the defendant's benefit as  
24 far as sentence exposure and so forth. No. 2, there's no  
25 prejudice because it really doesn't change the trial, because

1 when you get to the bones of this trial, this trial is about  
2 willfulness. It's not about challenging the government's case  
3 in chief. It's not about whether there is insufficient  
4 evidence to show that he filed a, failed to file a tax return  
5 or whether there's insufficient evidence to show whether he was  
6 required to file a tax return. The elements are pretty much  
7 conceded. It's just a matter of whether or not there's an  
8 affirmative defense applicable here because of the good faith.  
9 And that analysis doesn't change. It doesn't change the  
10 rulings that the Court has made as far as the exhibits that  
11 were excluded by the Court. Even with you go forward with the  
12 willful failure to file, those exhibits are not relevant that  
13 the Court excluded. And so there's very little prejudice, if  
14 not none at all, from going forward with the misdemeanors. It  
15 certainly inures to the defendant's benefit, because there's a  
16 felony exposure here. And the indictment properly put the  
17 defense on notice of the charges that are being tried.

18 And so with the authority that the Government cited,  
19 the Government contends that it is appropriate at this point to  
20 proceed in this posture and to go forward with the misdemeanor  
21 counts of 26:7203, failure to file and failure to pay taxes.

22 THE COURT: There would actually have to be a  
23 redacted indictment prepared substituting the statutory  
24 citation for 7203?

25 MR. CAMPBELL: That's correct. And there also would

1 have to be some redactions in accordance with the Court's  
2 earlier ruling to dismiss Counts 3 and 4. So those would have  
3 to be completely redacted from the indictment, and then the  
4 appropriate citation changes would have to be made, as well.

5 THE COURT: Mr. Becraft?

6 MR. BECRAFT: May it please the Court. This is a  
7 change in the trial posture for which we've had little notice,  
8 and the Government has had the opportunity to dig in and pull  
9 out some cases which we have not been, and I would like to also  
10 ask during the course of my remarks, Your Honor, that we be  
11 given some time to assess the situation.

12 But, you know, to address the point about what the  
13 Government is doing in this case, you know, the indictment  
14 charged four different counts. There was an attack made  
15 pretrial by motion to dismiss on the willful failure to file  
16 counts. The Court agreed and dismissed those counts. So  
17 pretrial, this was a tax evasion case for two counts. When we  
18 had the pretrial conference, the Court said: Defense, put in  
19 some new requested jury instructions, which I did. And that  
20 afternoon -- I think they were filed about 4:58 that afternoon,  
21 Friday, that Friday. And I was talking to Mr. Cryer on the  
22 phone, and we had, Mr. Campbell and I, had talked. You know,  
23 the pretrial order to submit a -- you know, requested to submit  
24 a suggested verdict form, which we did, which included those  
25 willful failure to file counts as kind of a lesser included

1 theory.

2 THE COURT: It's not a "kind of a lesser included  
3 theory." That was in fact my ruling, was it not?

4 MR. BECRAFT: Yes, Your Honor.

5 THE COURT: Just to make sure you understand what I  
6 ruled. It's there.

7 MR. BECRAFT: I understand, Your Honor.

8 THE COURT: And we're eventually, I hope, going to  
9 get to Federal Rule of Criminal Procedure 7C about whether your  
10 client was misled and thereby became prejudiced. Now, that's  
11 where I want to end up with, and I'm hearing a lot of hooey  
12 getting to it. So let's move it.

13 MR. BECRAFT: Our posture last week, even last  
14 Friday, was that Mr. Cryer no longer -- that's the reason why I  
15 submitted requested jury instructions that no longer included  
16 the lesser included offense. So we were going to ask that the  
17 Court not. We were going to oppose submission of this case on  
18 anything other than a tax evasion case. Now let me tell you  
19 the reasons why that would be the case.

20 The Government argues that there's no prejudice to  
21 us. Well, Mr. Cryer was preparing for trial on an evasion  
22 count. The evasion count requires an affirmative act of  
23 evasion. Our trial posture in reference to an evasion case was  
24 going to be an attack upon that affirmative act. The  
25 affirmative act in this particular indictment is this creation

1 of this trust and purported concealment of income from the  
2 trust. Well, first and foremost, Your Honor, on that  
3 affirmative act, the trust in question predated by more than a  
4 year, you know, any tax problems for Mr. Cryer.

5 THE COURT: Whoa. Let me cut you off right there.  
6 In ruling, I granted your motion to dismiss for duplicity but  
7 found that the 7203 failure to file and pay taxes was a lesser  
8 included offense within the evasion charges. Correct?

9 MR. BECRAFT: I understand that, Your Honor.

10 THE COURT: All right. Now, the Government comes in  
11 and says: We're not doing 7201, we're now agreeing to do 7203  
12 only. How does that prejudice you when you knew what the  
13 lesser included offense was going to be and it was going to be  
14 precisely the same proof?

15 MR. BECRAFT: First, Your Honor, we were going to  
16 oppose submission of the case going --

17 THE COURT: I'm not talking about the jury. I'm  
18 talking about going to trial, Mr. Becraft. I ruled that it was  
19 a lesser included offense and would be going to the  
20 instructions. You can object all you want to, but the ruling  
21 was going to stand. Okay?

22 MR. BECRAFT: I understand that, Your Honor.

23 THE COURT: Let's get to today. Tell me how when  
24 7203 on your motion became a lesser included offense pursuant  
25 to my ruling, how your client is somehow misled and then

1 prejudiced thereby with the Government removing the felony  
2 count and simply going with the lesser included misdemeanor  
3 offenses? Real simple. Real straightforward. Let me hear it.

4 MR. BECRAFT: This is the answer. This is the -- in  
5 light of the last-minute hour for which this argument comes up,  
6 Your Honor, I can't cite any case authority. I can say this,  
7 though. I think that the prejudice would be: No. 1, the  
8 defense would during the course of the trial oppose submission  
9 to this jury of a lesser included --

10 THE COURT: Yawn. Yawn. Yawn. Tell me how in  
11 changing the indictment to go on 7203 only, the misdemeanor  
12 count, the lesser included offense type, which is within the  
13 7201 per my ruling, how is your client misled? How is the  
14 burden of proof any different? How is anything any different,  
15 except for the fact that your client no longer faces a felony?

16 MR. BECRAFT: Here's -- if I can, Your Honor --

17 THE COURT: I'm listening.

18 MR. BECRAFT: -- the prejudice --

19 THE COURT: I haven't heard it.

20 MR. BECRAFT: The prejudice is: No. 1, we would  
21 oppose submission of this case to a jury --

22 THE COURT: Whoa. Sir, I am not at the jury trial  
23 phase of this in terms of submission to the jury. I'm not  
24 interested in what you plan to do at which time. I'm at the  
25 here and now. Tell me how your client is misled and thereby

1 prejudiced under Federal Rule 7 by the Government's proposed  
2 dismissal of its felony counts and going to trial on the lesser  
3 included offense only of the misdemeanors under 7203?

4 MR. BECRAFT: And in response to that, Your Honor,  
5 here's --

6 THE COURT: I'm listening. This is the fifth time --

7 MR. BECRAFT: (Indiscernible due to speaker overlap.)

8 THE COURT: -- I've asked the question --

9 MR. BECRAFT: (Indiscernible due to speaker overlap.)

10 THE COURT: -- Mr. Becraft.

11 MR. BECRAFT: The prej --

12 THE COURT: Silence. Answer the question. Don't  
13 tell me what you're going to do about opposing something when  
14 it goes to the jury. I want to know how the prejudice exists  
15 now.

16 MR. BECRAFT: I will phrase it the best way I can,  
17 Your Honor.

18 THE COURT: And don't tell me about going to the  
19 jury.

20 MR. BECRAFT: Well, the prejudice in changing the  
21 nature of the charge would be this: That the defendants would  
22 be at a -- the defendant would be in a stronger position in  
23 submitting the case to the jury on the evasion counts --

24 THE COURT: Would you prefer that we leave it as the  
25 evasion and simply take the lesser included verdict with it?

1 MR. BECRAFT: I'm --

2 THE COURT: And risk a conviction on the felony  
3 counts?

4 MR. BECRAFT: Your Honor --

5 THE COURT: Is that what you're telling me?

6 MR. BECRAFT: One of the things that our trial  
7 posture was going to be, Your Honor, was to attack on the  
8 evasion count and deal with the one affirmative act, which we  
9 think that we have a strong chance of showing that there is no  
10 affirmative act that transforms this case into an evasion case.

11 THE COURT: Bull you still have the lesser included  
12 offenses that the jury could say: You know, we agree, so we're  
13 going to find him guilty of failing to file and failing to pay  
14 taxes.

15 MR. BECRAFT: Well, I've stated the case, Your Honor.

16 THE COURT: All we've done is just lop off a whole  
17 bunch of proof and instead go real simple, straightforward,  
18 seems to me, that certification of no taxes, no tax returns  
19 filed from '90 -- what was it? 2000 and 2001. Real easy  
20 certificate: Not filed, no taxes paid. Now we've taken all of  
21 the other overhang, overlay, and simply stripped it away to the  
22 misdemeanor counts. How does that prejudice you?

23 MR. BECRAFT: All I'm saying, Your Honor -- and I've  
24 said it, and that's the extent of what I can argue in reference  
25 to the prejudice. We believe that we'd have a better shot with

1 a jury with an evasion case because the affirmative act's so  
2 weak.

3 THE COURT: Well, the Government's moved to dismiss  
4 that. Now you're left with the lesser included offense. Tell  
5 me how you're misled.

6 MR. BECRAFT: Well, the argument I had just told the  
7 Court is how I think we're prejudiced, that alone.

8 THE COURT: That's it?

9 MR. BECRAFT: Yes, Your Honor.

10 THE COURT: I'm going to give you till 10:00,  
11 Mr. Becraft, to review the cases that were submitted this  
12 morning. We're going to reconvene at 10:00, and by that time,  
13 since you have Mr. Harp here -- and, of course, your client is  
14 also a licensed Louisiana attorney. You have a triumvirate, a  
15 trio of people, that I expect to do two things: First of all,  
16 review those cases, be prepared to discuss them. Second, you  
17 need to explain to me how removing the felony count and only  
18 going with the misdemeanor count legally prejudices your  
19 client. Because I can simply continue this today, allow a  
20 superseding indictment to be filed, stripping away all the  
21 other stuff with the misdemeanors, and here we go. But, you  
22 know, that's really not necessary since I've already ruled that  
23 the superseding indictment language is a lesser included  
24 offense and not a separate offense. You get my drift here?

25 MR. BECRAFT: I sure do, Your Honor, and we welcome

1 the opportunity.

2 THE COURT: All right. You have until 10:00 to  
3 prepare. I expect you back here.

4 Mr. Campbell, you have provided copies of those cases  
5 to --

6 MR. CAMPBELL: Yes, I have.

7 THE COURT: -- counsel?

8 Very well, gentlemen. I'll see you back at 10:00.

9 (Recess 9:02 - 10:03 a.m.)

10 THE COURT: Thank you. Please be seated.

11 Mr. Becraft, when we last met, I had given you time to look at  
12 the citations offered by the Government in support of its  
13 decision to proceed only on the lesser included offenses and  
14 not to proceed on the felony evasion charges contained in the  
15 indictment. Have you read those?

16 MR. BECRAFT: We have, Your Honor. We withdraw our  
17 objections.

18 THE COURT: All right. Are we then ready to proceed  
19 with trial today?

20 MR. BECRAFT: (Nods head.)

21 THE COURT: Do you see that there are any changes  
22 from either side in how -- except for the jury verdict form  
23 which is easily redacted -- insofar as it impacts the  
24 stipulations that I got an unsigned copy of this morning?

25 MR. BECRAFT: It should not. The way we're

1 proceeding should not -- the stipulations will apply in either  
2 case, Your Honor.

3 MR. CAMPBELL: Right.

4 THE COURT: All right. Joint neutral statement, same  
5 thing?

6 MR. CAMPBELL: You have to change it from evasion to  
7 failure to file.

8 THE COURT: And are you going to do that?

9 MR. CAMPBELL: Yes.

10 THE COURT: All right. And you'll present it when?

11 MR. CAMPBELL: I can present it before the jury, the  
12 petit jury, is seated.

13 THE COURT: All right. If you'll be here at 1:15,  
14 we'll take care of any last-minute housekeeping details. The  
15 jury will be called here at 1:30. My decision was to postpone  
16 their arrival because I wasn't sure what was going to happen in  
17 the a.m. today. I didn't know whether we would be fully  
18 resolved, and I do not wish to make people sit around together  
19 downstairs, fuming at why they're not being called up in short  
20 order.

21 Any other details that we need to consider at this  
22 time from the Government's viewpoint?

23 MR. CAMPBELL: No, sir.

24 THE COURT: Mr. Becraft?

25 MR. BECRAFT: So we're going to select the jury at

1 1:30, Your Honor?

2 THE COURT: We will begin jury selection at 1:30.  
3 They will be up here.

4 Just so that you will know, because we have 48 people  
5 called, there will only be one available bench after they're  
6 seated.

7 MR. BECRAFT: Your Honor, I've seen some people  
8 outside. My instructions to them have been -- I thought we  
9 were going to pick this morning. I will tell them again,  
10 probably come back at 4:00.

11 THE COURT: Perfectly fine. But we'll have minimal  
12 seating available for the public during jury selection because  
13 of the number of jurors.

14 MR. BECRAFT: Your Honor, my message to them has been  
15 we don't want any -- they don't need to be in the courtroom.

16 THE COURT: No cross pollination, as it were.

17 Mr. Campbell, you'll have a redacted indictment  
18 prepared as well?

19 MR. CAMPBELL: Yes, I will.

20 THE COURT: And submitted to the Court?

21 MR. CAMPBELL: Yes, I will.

22 THE COURT: With nothing further, then, I will see  
23 you gentlemen at 1:15 p.m. We are in recess until that time.

24 (Recess had 10:07 a.m. - 1:20 p.m.)

25



1           THE COURT: Do you want to submit that at the  
2 appropriate time --

3           MR. BECRAFT: At the appropriate --

4           THE COURT: -- at the evidentiary phase?

5           MR. BECRAFT: -- time, Your Honor.

6           MR. CAMPBELL: And if there are no objections, I  
7 would ask that the Court read the stipulations to the jury at  
8 the close of opening statements, right before the first witness  
9 testifies.

10          THE COURT: All right. Becky, if you'll help me to  
11 remember to do that at that time.

12          I appears to me that we stand a substantial  
13 likelihood of seating a jury not later than 4:00 to 4:30, at  
14 which time I would prefer to do opening statements before we  
15 dismiss the jury so that we begin tomorrow with the first  
16 witness for the government. Is that possible?

17          MR. BECRAFT: I'm prepared, Your Honor.

18          THE COURT: Mr. Campbell?

19          MR. CAMPBELL: I'm prepared, Your Honor.

20          THE COURT: All right. We'll see how it goes, but  
21 that's my preference at this point.

22          All right. In this instance, gentlemen, in preparing  
23 the voir dire questions to the entire venire, I'm going to read  
24 the complete superseding indictment; and once we get the jury  
25 actually seated, we'll read the joint neutral statement. And

1 we'll proceed along those lines.

2 Any objection or other thing that we need to take up  
3 before we get our group of prospective jurors in?

4 MR. BECRAFT: None, Your Honor.

5 MR. CAMPBELL: None from the Government.

6 THE COURT: All right. We have one juror that has  
7 not reported, so we'll hang loose for just a few more minutes.

8 Counsel, Mr. Borseth, who is on your seating chart as  
9 Juror Seat No. 27 is 30 minutes late. I am going to proceed in  
10 his absence and have him sit in the jury assembly room for the  
11 rest of the day. I'm not going to bring him up midstream.

12 MR. BECRAFT: No objection.

13 THE COURT: Mr. Campbell, any objection to that  
14 procedure?

15 MR. CAMPBELL: No, sir.

16 (Whereupon, the venire enters and voir  
17 dire is conducted on the record.)

18 THE COURT: Counsel, do we have any preliminary  
19 issues to cover before beginning opening statements this  
20 afternoon? Mr. Campbell?

21 MR. CAMPBELL: None from the Government, Your Honor.

22 THE COURT: Mr. Becraft?

23 MR. BECRAFT: Nothing from the defense.

24 THE COURT: Ladies and gentlemen, we will proceed  
25 with opening statements in this matter.

1           Mr. Campbell, you have a total of 15 minutes in order  
2 to make your opening statements.

3           After which time, ladies and gentlemen, the defendant  
4 will then follow with any opening statement to be made.

5 Mr. Becraft will be the one to do that, if he chooses to do  
6 that. After that, we will then adjourn for the day.

7           Mr. Campbell, you may begin when you're ready, sir.

8                           OPENING STATEMENT BY THE GOVERNMENT

9           MR. CAMPBELL: May it please the Court. Members of  
10 the defense table. Ladies and gentlemen of the jury.

11           Before I begin with the substance of my opening  
12 statement, first I'd like to apologize for the quality of my  
13 voice. It appears that I picked the wrong time of the year to  
14 catch a cold. And if anybody know, probably the worst cold to  
15 ever catch is a summer cold. So, again, I want to apologize  
16 for the hoarseness of my voice.

17           "But nothing in life is certainly but death and  
18 taxes." Benjamin Franklin. Taxes, nobody likes to talk about  
19 them, nobody likes to hear about them, nobody likes to think  
20 about them, especially if you owe and have to pay them. So I'm  
21 not going to spend my opening statement trying to give you some  
22 civic lecture about how it's a civic duty to pay taxes and how  
23 important it is to pay taxes, because I don't have to tell you  
24 something that you already know. And regardless of our  
25 attitudes about taxes, the fact that we don't like to pay taxes

1 and, of course, we like to keep our money in our pockets, the  
2 truth is that, under the law, if you meet certain requirements,  
3 you have to file a tax return and you have to pay taxes.  
4 That's the law. And regardless of how we may feel about that,  
5 it is our duty to follow the law.

6 Now, what you're going to hear today in this case is  
7 about the defendant, Tommy K. Cryer, and the Government will  
8 show beyond a reasonable doubt that in this case the defendant  
9 decided not to follow the law. He decided not to follow the  
10 law by not filing his tax returns and by not paying the taxes  
11 that are required of him. And that is basically the element --  
12 the essence of the charges in the indictment. There are two  
13 counts, failure to file taxes and failure to pay taxes, which  
14 are both similar and which both acts are pleaded in Count 1 and  
15 Count 2 of the indictment. Count 1 deals with the tax year  
16 2000. Count 2 deals with the tax year of 2001.

17 Now, let's talk about the defendant, Tommy Cryer.  
18 You're going to hear that Tommy Cryer is a 1973 graduate of LSU  
19 Law Center. You're going to hear that he's a practicing  
20 attorney here in Shreveport, Louisiana. He owns and operates  
21 his own law practice, Tommy K. Cryer, Attorney At Law, which is  
22 located here in Shreveport. He has one employee.

23 You will hear that from 1997 -- excuse me, from 1993  
24 to 2 -- to the present, he hasn't filed a tax return. You will  
25 hear that from 1993 to the present that he hasn't paid federal

1 taxes. Hasn't filed a federal tax return, hasn't paid federal  
2 taxes. You're also going to hear evidence to show that from  
3 1997 to 2001 the defendant earned a combined gross income from  
4 his law practice somewhere between \$766,000 to \$783,000,  
5 somewhere in that range, the high end and the low end, and he  
6 paid zero federal income taxes on the money that he earned.

7           Now, the law treats tax offenses different from other  
8 kinds of offenses when it comes to the state of mind that the  
9 government has to prove. For example, if someone is charged  
10 with, let's say, burglary, I do not have to prove that the  
11 defendant knew that it was against some state statute or  
12 against some federal statute or duty or obligation not to  
13 commit a burglary. Only thing I would have to prove is that  
14 the person intended to burglarize someone's home and prove it  
15 beyond a reasonable doubt. It doesn't work that way with tax  
16 cases. In tax cases, I have to show that the person was aware  
17 of some legal duty -- and in this case, he was aware of the  
18 legal duty to file a tax return and was aware of a legal duty  
19 to pay taxes -- and yet chose not to follow that legal duty.  
20 To sum up, that's what we call willfulness. It's a greater  
21 state of mind that I have to prove in this case than in your  
22 normal criminal cases.

23           Now, what evidence you're going to hear today to show  
24 that the defendant acted willfully, in other words, this is not  
25 some case where he mistakenly didn't file his taxes or it was

1    inadvertence or it was by accident, that it was willful?  
2    You're going to hear and see in some of the documents that  
3    you'll see that the IRS sent the defendant delinquency notices  
4    letting him know that you're behind, you haven't paid your  
5    taxes, putting him on notice. You're going to hear that up to  
6    1993, that prior to that the defendant did file federal income  
7    taxes and tax returns. So it's not a situation where he hadn't  
8    filed. He did file up till 1993.

9            You're also going to hear that in the years that we  
10    charged, 2000 and 2001, the defendant submitted the 941 returns  
11    for his legal assistant. And basically, these are quarterly  
12    returns that the law requires that employers submit to the IRS  
13    for your withholdings. So, for example, your FICA  
14    withholdings, every quarter your employer has to submit those  
15    withholdings to the IRS out of your check. And they do it four  
16    times a year, once for every quarter. You're going to hear the  
17    defendant in 2000 and 2001 did the quarterly withholdings for  
18    his employee; withheld her taxes out of her check and sent them  
19    to the IRS according to the law.

20           As I told you earlier, the defendant is a 1973  
21    graduate of LSU Law Center. Been practicing law for a long  
22    time. Certainly based on that education and knowledge and  
23    experience, it's going to show you that the defendant was well  
24    aware of his obligation to file taxes and to pay federal taxes.  
25    The date of April 15, everybody know what's special about

1 April 15. That's the day everybody's running around like  
2 chickens with their heads cut off trying to get everything  
3 together to pay those taxes, because that's a legal obligation,  
4 a legal duty that they have to fulfill. And the evidence will  
5 show that the defendant chose not to do that in this case.

6 Now, in what form are you going to hear and see this  
7 evidence? You're going to see various documents to show that  
8 defendant didn't file the tax returns, you're going to see  
9 various documents to show that he was given these delinquency  
10 notices, and you're going to see some of the 941 quarterly  
11 returns that he filed on behalf of his legal assistant, his  
12 secretary, that works for him.

13 You're also going to hear from George McGovern. He's  
14 a local CPA here and he did the defendant's accounting work as  
15 far as looking at his bank statements for his law firm to see  
16 how much money the firm took in, how many deductions were  
17 applicable and so forth, and came up with some calculations  
18 from 1997 to 2001 to show exactly what the defendant's tax  
19 liability was.

20 You're also going to hear from Gloria Worthey, who  
21 worked for the defendant. And she's going to tell you about  
22 the law firm and also tell you about her quarterly returns.

23 And then, finally, you're going to hear from Agent  
24 Jimmy Sandefur, who works for the IRS, and he's what we call a  
25 summary witness. He's going to sum all of this up for you.

1 And, also, he's going to show you what some of his calculations  
2 reveal as far as the defendant's tax liability and what he owes  
3 in federal income taxes.

4 So at the conclusion of this case, the Government  
5 will ask you to return verdicts of guilty as charged, because  
6 all of the evidence will show beyond a reasonable doubt that  
7 the defendant willfully for 2000 and 2001 failed to file  
8 federal tax returns as required by law and failed to pay his  
9 taxes, federal taxes, as required by law. Thank you.

10 THE COURT: Thank you. Mr. Becraft?

11 OPENING STATEMENT BY DEFENDANT

12 MR. BECRAFT: May it please the Court. Mr. Campbell.  
13 Ladies and gentlemen of the jury.

14 Let me reduce myself. I'm Larry Becraft. I'm a  
15 criminal defense attorney. And I'm going to be assisted by  
16 that man right there (indicating), George Harp. It is our job  
17 to come in here to defend Tommy Cryer. So what you have --  
18 when you look at us sitting over there on that side of the  
19 room, you've got two lawyers and in the center is the  
20 defendant, a lawyer. And you might think: How in the world  
21 would a lawyer get involved in something like this?

22 Mr. Cryer is charged with two counts of willful  
23 failure to file income tax returns. You're going to see in  
24 this case that -- as Mr. Campbell pointed out a minute ago,  
25 we're going to have George McGovern to get up here and he's

1 going to testify about what Mr. Cryer made. We're going to  
2 have Mr. Sandefur get up here; he's going to testify about what  
3 he made, deductions, and everything else. Ladies and  
4 gentlemen, let me be brutally frank and blunt: Most of this  
5 case is not about the government's proof. You know, I hate to  
6 sit there and say: Well, I'll probably be twiddling my thumbs.  
7 But a lot of it, probably most of it, of the government's case  
8 is not going to be contested. But that doesn't mean that this  
9 is not a disputed case. It is, ladies and gentlemen, a very  
10 disputed case.

11           One of the things that is going to be critically  
12 important for you, as Mr. Campbell was stating a moment ago, we  
13 have this element known as willfulness. He's got to show, you  
14 know, that things were done by Mr. Cryer willfully. Well,  
15 ladies and gentlemen, that's what I label the criminal state of  
16 mind, and that's what's at issue in this case: Did Tommy Cryer  
17 have that criminal state of mind in order to be convicted of  
18 these offenses, or did he not have that criminal state of mind?  
19 And the defense suggests to you, ladies and gentlemen, that the  
20 evidence in this case will be that Tommy Cryer did not act  
21 willfully; that Tommy Cryer did not act with the criminal state  
22 of mind in order to be found guilty of these offenses.

23           Now, let me quickly kind of summarize for you, if I  
24 can, what the facts of this case will be.

25           Tommy Cryer was born in 1949 in Lake Charles,

1 Louisiana. Sometime before he got out of grade school, his  
2 family, which included six other brothers and sisters and his  
3 parents, moved from Lake Charles about 25 miles out of town to  
4 a farm, and that's where Tommy Cryer grew up a farm boy. And  
5 we all know what farm boys can be. Got a lot of  
6 responsibility. And Tommy Cryer decided at an early age that  
7 he wanted to become a lawyer. Well, becoming a lawyer is not  
8 something that's easy, especially if you're in his  
9 circumstances, the son of a farmer. And by his bootstraps,  
10 Tommy Cryer went to a local college, paid his own way, and then  
11 he works his way through law school. And Tommy Cryer was so  
12 interested in learning, it's my recollection that he graduated  
13 with honors from undergraduate school and he also had a very  
14 high ranking -- it may have been cum laude -- from law school,  
15 and he was in a prestigious organization in law school known as  
16 the Order of the Coif. Now, that, ladies and gentlemen, is  
17 somebody that's extraordinary. And may I suggest to you that  
18 that's exactly what Tommy Cryer is. He's different, he's  
19 smart, and he worked hard.

20           After he got out of law school, he worked for a  
21 couple months for a Louisiana constitution commission. Then he  
22 got a job up here in Shreveport, took the bar exam, passed, and  
23 worked for a firm here in town that no longer exists, the  
24 Hargrove law firm. And after he got out -- after he spent  
25 about two years working for Hargrove, he went out on what we

1 call solo practice. He was on his own. And from that time  
2 forward, which would be about 1975 all the way up through last  
3 week, Tommy Cryer has been in solo practice of law.

4 As Mr. Campbell mentioned moments ago, Mr. Cryer, you  
5 know, when he gets up here and testifies, he's going to say:  
6 Hey, in law school, I didn't learn anything about taxes.  
7 There's an elective course you can take. I didn't take it.  
8 Wasn't interested in it. And like most everybody else in  
9 America, he just simply, with no training, a lawyer with no  
10 training in taxes, just simply did what everybody else did.  
11 But there came a day.

12 This is a couple of weeks after Mr. Cryer sends in a  
13 check for about almost \$4,000. I think the check is in June of  
14 '94, and sometime in late June or maybe July of '94 Mr. Cryer  
15 is going to lunch and one of the parties that's in his luncheon  
16 group is a man by the name of Jan Holland. And Jan Holland  
17 started some discussions, and he brought up the point: Well,  
18 Mr. Cryer, you are a lawyer. I'm not a lawyer, but I studied  
19 the tax laws. Gee, you know, is it possible that you may not  
20 owe the tax? Is it possible that you might not be required to  
21 file a return? And when this -- when this was told by Mr. Jan  
22 Holland --

23 THE COURT: Mr. Becraft, in your opening, restrict it  
24 to the evidence that will be presented without the shading.  
25 Second, you're into hearsay testimony and I haven't heard word

1 one from the defendant at all about introducing that witness  
2 that you just referred to, his testimony, and you will not.  
3 Proceed.

4 MR. BECRAFT: What Mr. Cryer learned from having  
5 conversations with Jan Holland is this: If there's a position,  
6 you've got to look at the tax law --

7 THE COURT: And that's still hearsay as a --

8 MR. CAMPBELL: Okay.

9 THE COURT: -- response and it's not going to come  
10 into evidence and cannot come into evidence, Mr. Becraft. Move  
11 on.

12 MR. BECRAFT: Having his interest piqued in a study  
13 of the tax laws, Mr. Cryer went to the law library and started  
14 looking around for a section of the Internal Revenue Code that  
15 made him liable. He hopped out of court one day sometime in  
16 July, maybe August of 1994, runs up to the law library, pulls  
17 out the Internal Revenue Code, starts flipping through there,  
18 wanting to try to find the statute that makes him liable, and  
19 doesn't find it on this occasion. And later on Mr. Cryer says:  
20 Well, I just -- I've got to find this. And he continues to  
21 look. And after a couple of weeks, Mr. Cryer says: I've got  
22 to get a copy of the Internal Revenue Code. He gets a copy of  
23 the Internal Revenue Code, and I think his testimony will be  
24 that, you know, maybe it might be August or September of 1994  
25 he has his, this Internal Revenue Code, he's been up at the law

1 library looking for the statute that makes him liable. He now  
2 has an Internal Revenue Code and he spends three or four nights  
3 combing through the Internal Revenue Code looking for what he  
4 thought was there. And what he thought was there was a statute  
5 that made him, a citizen living here in Louisiana, liable for  
6 the federal income tax. And Mr. Cryer concluded there is no  
7 such statute. Based on his training and understanding of the  
8 law, he believed that the absence of that statute, the logical  
9 consequence of that was that he wasn't required to file an  
10 income tax return.

11 That, ladies and gentlemen, is what this case is  
12 about. It's intent. It's beliefs. There's going to be a  
13 couple of other beliefs. We don't have the time this  
14 afternoon. I think I made a promise to the Court to try to  
15 shut down before 5:00. But Mr. Cryer has done more than just  
16 study the Internal Revenue Code. He has spent a great deal of  
17 time, he spent a great deal of time in '95 and again in 1999,  
18 doing what somebody like him, the Order of the Coif, you know,  
19 one of those guys from law school that had high grades, digging  
20 in and learning the law in a field that he had never looked at  
21 before, and he reached these conclusions: I'm not liable for  
22 the federal income tax. He reached this conclusion, this  
23 belief, ladies and gentlemen, that his money that he received,  
24 his fees from working as a lawyer, did not constitute income.

25 Now, ladies and gentlemen, when Mr. Cryer gets up on

1 the stand, I want -- I want to make this perfectly clear: The  
2 Court is going to be giving the jury the instructions on the  
3 law in this case, not Mr. Cryer. What Mr. Cryer will give to  
4 you is his testimony. And what he will give to you is his  
5 belief about what the law is. And that belief is, encompasses  
6 these beliefs: He believes sincerely that he is not required  
7 to file income tax returns because he's not liable for the  
8 federal income tax. He sincerely believes he's not required to  
9 file income tax returns because his fees do not constitute  
10 income. And there's going to be a couple of other arguments  
11 he's going to lay out in his testimony. But once you hear that  
12 testimony, it will be perfectly clear, crystal clear, ladies  
13 and gentlemen, that the missing element in this case, what the  
14 government cannot prove, is that Mr. Cryer acted with criminal  
15 state of mind essential for conviction. And in the absence of  
16 that, and in fact, with overwhelming proof that he acted in  
17 good faith, it'll be your duty to acquit Tommy Cryer on both  
18 counts of this indictment.

19 Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Becraft.

21 Ladies and gentlemen, it's shortly after 5:00 and  
22 we're going to adjourn at this particular point of the evening.  
23 Typically, I allow the juror living the farthest from the  
24 courthouse to pick our start and stop times each day. Is 9:00  
25 an agreeable time tomorrow to begin? Does anyone have any

1 difficulty or perceived difficulty in making it for 9:00?

2 (No audible response.)

3 THE COURT: I'd like you here for 8:45. In a moment  
4 we will dismiss and our court security officer will take you to  
5 the jury assembly room which is where you will report to in the  
6 morning not later than 8:45, and we will begin with testimony  
7 promptly at 9:00 in the morning. A couple of cautionary  
8 instructions:

9 Do not talk about this with anyone. You have not  
10 heard any evidence yet. You may think you know what the case  
11 is about. You have heard only the outline of what that party  
12 intends to prove. Whether it's proved or not will be totally  
13 up to you.

14 Do not listen to newscasts tonight. Don't listen to  
15 the radio tonight on a newscast. Don't pick up the newspaper  
16 and read through it. For tomorrow morning, just ignore those  
17 particular pieces of the media. We need you fair and  
18 impartial, with no one trying to shade any information or  
19 provide you with any information about anything having to do  
20 with this case.

21 So with that, we are going to adjourn, and I will  
22 hope to see everybody in the jury room by 8:45 in the morning  
23 to start promptly at 9:00.

24 All rise for the jury.

25 (Jury exits courtroom.)

1           THE COURT: All right. Before we adjourn today, any  
2 details, housekeeping that needs to be taken up this afternoon?

3           MR. BECRAFT: None, Your Honor.

4           MR. CAMPBELL: No, sir.

5           THE COURT: Very well. We will be here ready to  
6 proceed at 8:45 in the morning. We will address anything that  
7 may have popped up overnight. We're adjourned.

8           MR. BECRAFT: Have a good evening, Your Honor.

9                   (Proceedings adjourned at 5:05 p.m.)

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I, Marie Moran Runyon, Official Court Reporter, do hereby certify that the foregoing pages numbered 1 through 36 do constitute a true and correct record of proceedings had in said trial to the best of my ability and understanding.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Subscribed and sworn to this 14th day of August, 2007.

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