

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

UNITED STATES OF AMERICA,	)	No. 3:06cr83MCR
Plaintiff,	)	
	)	DEFENDANT’S MOTION TO DISMISS
v.	)	COUNTS 1 THROUGH 12 AND 58 OF
	)	THE INDICTMENT
KENT E. HOVIND, and	)	
JO D. HOVIND,	)	
Defendants.	)	

COMES NOW the Defendant Kent E. Hovind, by and through his counsel of record, and hereby moves this Court to dismiss counts 1 through 12 and count 58 of the indictment with prejudice based on the numerous errors contained therein. Dr. Hovind reserves all rights without waiving any, including the right to amend this motion. This motion is supported by the attached memorandum.

Respectfully submitted this 27th day of September, 2006.

/s/ Alan S. Richey  
 Alan Stuart Richey  
 Counsel for Kent E. Hovind

**I. COUNTS 1 THROUGH 12 OF THE INDICTMENT SHOULD BE DISMISSED BECAUSE THEY FAIL TO ALLEGE ALL LEGAL REQUIREMENTS.**

Counts 1 through 12 of the Indictment allege that each count is a violation of 26 U.S.C. § 7202. Section 7202 specifically provides, “Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall ... be guilty of a felony.”

These counts fail to allege all legal requirements and must therefore be dismissed.

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Of the Indictment

**A. The Indictment Is Constitutionally Defective As It Fails To Include The Congressional Requirements Of The Sections In Title 26 That Impose The Underlying Taxes And Duties.**

Counts 1 through 12 fail to allege the statutory citations in title 26 for the underlying FICA and income tax and for the duties to collect, account for, and pay over those taxes. It is not section 7202 that imposed these requirements to collect, account for, pay over, and impose a tax, for the plain language of the statute clearly provides “required under this title” and “imposed by this title.” It is a well-settled principle of law that when the plain language of a statute mandates something or provides a directive, there is clear indication of Congress’ intent. *National Ass’n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 826, 833 (1983); *FEC v. Democratic Senatorial Campaign Comm’ee*, 454 U.S. 27, 32 (1981). In construing a statute, a court must begin with the language of the statute. *T.A.M.A. v. Lewis*, 444 U.S. 11, 15-16 (1979). The Supreme Court has given guidance in constructing a statute:

Furthermore all the words used in the statute should be given their proper signification and effect: ‘We are not at liberty,’ said Mr. Justice Strong, ‘to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon’s Abridgement, sec. 2, it was said that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.” This rule has been repeated innumerable times.’ *United States v. Lexington Mill Co.*, 232 U.S. 399, 410 (1914), *citing Washington Market Co. v. Hoffman*, 101 U.S. 112, 115.

Thus, Congress has required that at least six other sections in title 26 impose the requirement “to collect, account for, and pay over,” as well as impose a tax. This construction is agreed to by the Supreme Court, who found that the common purpose of the criminal tax statute is, “to induce prompt and forthright fulfillment of every duty under the income tax law **and to provide a penalty** suitable to every degree of

delinquency.” *Spies v. U.S.*, 317 U.S. 492, 497, 499, (1943)(emphasis added). The conjunctive shows that one law imposes a duty while a separate and distinct law imposes the penalty. “It is common ground that this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions.” *Cheek v. U.S.*, 498 U.S. 192, 203 (1991); *referencing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Crowell v. Benson*, 285 U.S. 22, 62 and n.30 (1932); *Public Citizen v. DOJ*, 491 U.S. 440, 465-66 (1989).

The government acknowledges its duty to allege and prove that other sections in title 26 impose the taxes and the duties to collect, account for, and pay over the taxes, because the indictment alleges, “Employers are **required** to withhold FICA taxes from employees’ wages and pay a matching amount of these taxes.” Indictment, 1. Thus, by this allegation, there must be some other section in title 26 that imposes FICA taxes on employees and another section imposing FICA on employers. Further, there must also be a section in title 26 requiring employers to withhold the FICA tax. The indictment also alleges, “Employers were **required** to deposit federal income tax withheld along with the FICA taxes by submitting quarterly payments to the IRS.” Indictment, 2. Thus, another section in title 26 must impose federal income tax, and yet another section require an employer to make quarterly payments. The indictment further alleges that “all employers who paid [the quarterly payments] were **required** to file Form 941.” Indictment 2. Yet another section must therefore impose the requirement to file the form 941. Thus, there are at least six other sections of title 26 that should have been alleged but are not. Further, section 7202 does not impose the above-noted requirements alleged in the indictment.

The Sixth Amendment requires that a citizen “be informed of the nature and cause of the accusation.” It is a well-settled principle of law that a person needs to know what law or duty was violated. *See, e.g., United States v. Cruikshank*, 92 US 542 (1876); *United States v. Shepard*, 235 F.3d 1295 (11<sup>th</sup> Cir. 2000); *United States v. Rankin*, 870 F.2d 109 (3<sup>rd</sup> Cir. 1989); *Sheppard v. Rees*, 909 F.2d 1234 (9<sup>th</sup> Cir. 1989); *United States v. Crummer*, 151 F.2d 958 (10<sup>th</sup> Cir. 1945) (cert. denied); *Carter v. U.S.*, 173 F.2d 684 (10<sup>th</sup> Cir. 1945) (cert. denied); *Spence v. Dowd*, 145 F.2d 451 (7<sup>th</sup> Cir. 1944). In *Higley v. Commissioner*, 69 F.2d 160, 162-63 (8<sup>th</sup> Cir. 1934), the court stated, “Liability for taxation must clearly appear [from a statute imposing the tax].” *citing Miller v. Standard Nut*, 284 U.S. 498, 508 (1932); *United States v. Updike*, 281 U.S. 489, 496 (1930); *United States v. Merriam*, 263 U.S. 179, 187 (1923). It is of constitutional magnitude that the specific law or duty violated be made known fully and clearly so as to protect a defendant from double jeopardy and to prepare an adequate defense under the 5<sup>th</sup> and 6<sup>th</sup> Amendments. *See, e.g., United States v. Sloan*, 939 F.2d 499 (7<sup>th</sup> Cir. 1991); *Sutton v. U.S.*, 157 F.2d 661 (5<sup>th</sup> Cir. 1946); *Crummer, supra*; *Carter, supra*; *Grimsley v. U.S.*, 50 F.2d 509 (5<sup>th</sup> Cir. 1931); *State ex rel Wong Sun v. District Court*, 112 Mont. 153, 113 P.2d 996 (1941).

“If ‘defendants in a tax case could not have ascertained the legal standards applicable to their conduct, criminal proceedings may not be used to define and punish an alleged failure to conform to those standards.’” *United States v. Harris*, 942 F.2d 1125, 1131 (7<sup>th</sup> Cir. 1991); *citing United States v. Mallas*, 762 F.2d 361 (4<sup>th</sup> Cir. 1985). The *Harris* court went on to say, “If the obligation to pay a tax is sufficiently in doubt, willfulness is impossible as a matter of law, and the ‘defendant's actual intent is

irrelevant.” *Id.* at 1132; citing *United States v. Garber*, 607 F.2d 92, 98 (5<sup>th</sup> Cir. 1979) (en banc), quoting *United States v. Critzer*, 498 F.2d 1160, 1162 (4<sup>th</sup> Cir. 1974).

An indictment sufficiently charges an offense if it alleges the elements of the offense and fairly informs the defendant of the charge against which he must defend; it must also enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. U.S.*, 418 U.S. 87, 117 (1974); *U.S. v. Pease*, 240 F.3d 938, 942 (11th Cir. 2001). In this case, the indictment fails to include essential elements of what other statutes impose the underlying taxes and the underlying duties to collect, account for and pay over those taxes. The Government was required to allege, and thus prove at trial, the Defendant was a person required by Congress under Title 26 to “collect, account for, and pay over any tax imposed by this title”. Neither section 7202 nor any other provision alleged in the indictment, specifically mentions the withholding of “federal income taxes” or “FICA taxes”. In fact, the indictment does not allege what specific provision in Title 26 places a duty on the Defendant to “collect, account for, and pay over” any withheld federal income taxes or FICA taxes.

The Government alleges the Defendant did not withhold from the employee’s pay, so being required to “pay over” or “pay” should be dismissed by the Court as the indictment admits no withholding took place.

The Government alleges the Defendant did not withhold from the employee’s pay, so being required to file Form 941 should also be dismissed by the Court in this regard.

Section 7202 has within its language several ambiguous crimes. These include: failure to collect, failure to account, failure to pay over. Each term is potentially a separate crime.

If this Court dismisses the claims the Defendant was required to pay over since he is alleged to never have collected, and dismisses the “requirement” to make form 941s, this leaves only the allegation that Defendant willfully failed to collect as the basis of the Grand Jury’s probable cause of the indictment.

The indictment does not allege what specific provision required the Defendant to force anyone under his responsibility to submit a W-4 Form. This claim should also be dismissed.

A district court is “required to dismiss the indictment if it fails to allege facts that constitute a prosecutable offense.” *United States v. Cure*, 804 F.2d 625, 627 (11<sup>th</sup> Cir.1986). Because the indictment is constitutionally flawed, the indictment must be dismissed with prejudice. *See, e.g., United States v. Sampson*, 371 U.S. 75 (1962).

**B. The Indictment Is Constitutionally Defective As It Fails To Allege All Requirements Of Willfulness, Including That Dr. Hovind Had Actual Knowledge Of The Laws Imposing The Taxes And Imposing The Duties To Collect, Account, And Pay Over The Taxes.**

The indictment is constitutionally defective as it fails to allege that Dr. Hovind had actual knowledge of the laws imposing the taxes and imposing the duties to collect, account for, and pay over the FICA and income taxes. The indictment alleges that Dr. Hovind “did willfully fail to deduct, collect, truthfully account for and pay over to the IRS federal income tax and FICA tax, ... by failing to file the appropriate IRS Form 941, ... and by failing to withhold and pay federal income tax and FICA tax to the IRS.” Indictment, 4.

“Criminalization of the willful failure to pay is not new to the criminal code; it appears frequently in the tax statutes.” *United States v. Williams*, 121 F.3d 615, 620 (11th

Cir. 1997), cert. denied, 118 S.Ct. 1398 (1998). “Section 7202 [ ] is a felony statute and explicitly requires proof of **willfulness**.” *U.S. v. Erne*, 576 F.2d 212, 215 (9th Cir. 1978).

In *U.S. v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), the Eleventh Circuit described the term “willfully” to require a finding of specific intent, *meaning the intent to violate the law*; that is, acting with a “bad purpose” to disobey or disregard the law.” *Id.* at 1577 (emphasis added), *citing Cheek*, at 200 (interpreting the Internal Revenue Code and noting that the specific intent interpretation of “willfully” in the federal tax statutes is an “**exception to the traditional rule**” that “willfully” requires a finding of only general intent, applied “largely due to the complexity of the tax laws”). That court reiterated that “willfully” means, “the specific intent to do something the **law forbids**, that is, with bad purpose either to **disobey or disregard the law**.” *United States v. Vazquez*, 53 F.3d 1216, 1221 (11<sup>th</sup> Cir.1995).

“Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.” *Cheek*, 498 U.S. at 201. *See also Williams, supra*. The three prong test announced in *Cheek* was an act by the Supreme Court to further clarify the previous meaning assigned to the term “willfulness,” where the previous definition was the “voluntary, intentional violation of a known legal duty.” *Id.* at 200. *See also, Cooper v. U.S.*, 60 F.3d 1529 (11th Cir. 1995).

The Ninth Circuit, in reviewing recent Supreme Court cases, has held, “In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute.” *Reynolds v. Hartford*, 435 F.3d 1081, 1098 (9<sup>th</sup> Cir.2006). Congress enacted an exception to the “general rule” that “ignorance of the law” is no defense in criminal cases when it involves “Tax Crimes” and “Bank Secrecy” Crimes. *Cheek*, 498

U.S. at 199. This is because the “proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.” *Id.* at 200.

The Court explained this rule more fully, “in certain cases involving **willful violations of the tax laws**, we have concluded that the jury must find that the **defendant was aware of the specific provision of the tax code** that he was charged with violating.” *Bryan v. U.S.*, 524 U.S. 184, 194 (1998), *citing Cheek*, 498 U.S. at 201, (emphasis added). The Court continued, “Both the tax cases and [banking cases] involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we **held** that these statutes ‘carve out an exception to the traditional rule’ that ignorance of the law is no excuse and require that the **defendant have knowledge of the law.**” *Id.* at 194-195 (emphasis added). The rule of law as set forth by the Supreme Court is that in tax and banking cases, the government must prove that “**THE DEFENDANT WAS AWARE OF THE SPECIFIC PROVISION OF THE TAX CODE THAT HE WAS CHARGED WITH VIOLATING.**” *Id.* (emphasis added).

The Ninth Circuit, in citing *Bryan* at 194-195, found, “the cases to which *Bryan* refers are cases in which the Supreme Court read the **element** of ‘actual knowledge of the law’ into complex statutes that punished ‘willful’ failures to perform statutory duties.” *United States v. Hancock*, 231 F.3d 557, 562 (9<sup>th</sup> Cir.2000)(emphasis added), *citing Ratzlaf v. U.S.*, 510 U.S. 135, 149 (1994), and *Cheek*, 498 U.S. at 201. Thus, an “ELEMENT” of the crime is “ACTUAL KNOWLEDGE OF THE LAW.” *Id.*(emphasis

added). This is particularly true when there are “statutory duties” that need to be performed. *Id.*

**C. The Indictment Does Not Allege The Lesser Offense Of Section 7215 Which Does Not Require A Finding Of Willfulness But Still Requires Prior Notice Of A Violation Of The Law Before Being Charged.**

The indictment did not allege the lesser offense of Section 7215 which does not require willfulness but still requires prior notice of a violation of the law prior to being charged. “Prior to the enactment of section 7215, Congress relied exclusively upon 26 U.S.C. § 7202 for the criminal enforcement of employer's withholding tax duties.” *Erne*, 576 F.2d at 215.

Congress responded specifically to “the difficulty of proving willfulness” by enacting section 7215. *U.S.Code Cong. & Admin.News*, pp. 2187, 2189 (1958). Courts have held that “section 7215 does not require proof of intent.” See *United States v. Hemphill*, 544 F.2d 341, 343-44 (8th Cir. 1976), cert. denied, 430 U.S. 967, 97 S.Ct. 1648, 52 L.Ed.2d 358 (1977) (delineation of the elements with no mention of mental state); *United States v. Dreske*, 536 F.2d 188, 196 (8th Cir. 1976) (“state of mind does not provide a defense to the § 7215 charge”); *United States v. Gorden*, 495 F.2d 308, 310 (7th Cir.), cert. denied, 419 U.S. 833, 95 S.Ct. 58, 42 L.Ed.2d 59 (1974) (“It has been held that defendant's state of mind does not provide a defense to the Section 7215 misdemeanor charge”).

The Ninth Circuit further stated, “we are not unconcerned with the important policy and jurisprudential principles associated with the traditional rule that criminal liability requires some showing of criminal intent.” *Erne*, 576 F.2d at 215. Their concern was ameliorated by the fact that a crime under section 7215 cannot be committed unknowingly. Section 7512(a) provides that when any person fails properly to collect,

account for, and pay over certain taxes, e.g., employee withholding taxes, he shall be given hand-delivered notice that he has failed to comply with the law. Section 7512(b) requires a person receiving this notice to establish a separate bank trust account in favor of the government and to keep the funds he is required to collect in the account until paid over to the government. Section 7215 criminalizes, with certain exceptions, the failure to comply with any provision of section 7512(b). Thus, while intent need not be proven as an element of a section 7215 offense, the individual is adequately protected by the guarantee of a notice and opportunity to correct nonconforming conduct. *Gorden*, 495 F.2d at 310.

Thus, the statutory scheme makes it clear that one cannot be criminally liable unless he has first been personally advised that *he is in violation of the tax code*, and thereafter continues to fail to perform the duties as required by law. The indictment not only fails to allege that Dr. Hovind had knowledge of any legal duties to collect, account for (by filing forms), and pay FICA and income taxes, there is also no allegation that he was ever advised prior to being charged that he was violating the law. Thus, the indictment fails to allege notice and knowledge of the law, and thus the indictment should be dismissed with prejudice.

**II. COUNTS 1 THROUGH 10 & COUNT 58 OF THE INDICTMENT SHOULD BE DISMISSED BECAUSE THEY ARE OUTSIDE THE LIMITATIONS PERIOD.**

Counts 1 through 10 and Count 58 of the indictment should be dismissed with prejudice because the statute of limitations has run on those charges. Section 7202 makes it a crime for any person to willfully fail to collect any tax imposed by this title that they are “required” to collect. Congress has clearly stated that the statute of

limitations for a criminal prosecutions is only three years. 26 U.S.C. § 6531.

Specifically, Congress provided, “No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense.” 26 U.S.C. § 6531.

The statute of limitations begins to run when the crime is complete. *Toussie v. U.S.*, 397 U.S. 112, 115 (1970); *Pendergrast v. U.S.*, 317 U.S. 412, 418 (1943). “A crime is complete as soon as every element in the crime occurs.” *United States v. Payne*, 978 F.2d 1177, 1179 (10<sup>th</sup> Cir.1992), citing *United States v. Musacchio*, 968 F.2d 782, 790 (9<sup>th</sup> Cir.1991).

**A. The Statute Of Limitations Has Run On Counts 1 Through 10.**

Counts 1 through 12 of the indictment allege that Dr. Hovind “did willfully fail to deduct, collect, truthfully account for and pay over” FICA and income tax to the IRS. Specifically, count 1 alleges a failure to collect on March 31, 2001; count 2 alleges it was due on June 30, 2001; count 3 alleges it was due on September 30, 2001; count 4 alleges it was due on December 31, 2002; count 5 alleges it was due on March 31, 2002; count 6 alleges it was due on June 30, 2002; count 7 alleges it was due on September 30, 2002; count 8 alleges it was due on December 31, 2002; count 9 alleges it was due on March 31, 2003; count 10 alleges it was due on June 30, 2003. Indictment, 4-5. The indictment was found on July 11, 2006. Indictment, 10. Thus, counts 1 through 10 are outside the statute of limitations period and must be dismissed with prejudice.

Section 6531 does allow for an exception of a six year period of limitation for 8

specific offenses. Section 7202 is an offense that, if not extended by the exceptions in section 6531, is limited to 3 years from the date of the alleged offense pursuant to section 6531. Section 6531 has divided the Circuits with some holding it does not extend alleged crimes under section 7202 regarding failure to pay a tax. *United States v. Block*, 660 F.2d, 1086(5th Cir.1980); accord *U.S. v. Musacchia*, 900 F.2d 493 (2d Cir.1990)(Section 6531(4) is directed at “the offense of willfully failing to pay any tax,” not a class of offenses.). “It is quite clear that failure to ‘pay over’ third party taxes [under ' 7202] is substantively different from failure to pay taxes.” See *Slodov v. United States*, 436 U.S. 238, 248-50 (1978), quoting *United States v. Block*, 497 F.Supp. 629 (N.D.Ga.), aff'd, 660 F.2d 1086 (5th Cir. 1980).

It is clear that Congress did not intend for every tax offense to be a six year limitation as extended by section 6531. If Congress had intended this then they could have simply written section 6531 to make all tax offenses limited in prosecution by 6 years from the date the offense was completed. Otherwise, if the government opposes Defendant's argument then it could respond by identifying which provisions from section 7201 through 7215 are excluded from the 6 year limitation period extension. Inasmuch as failure to collect is not listed in section 6531 either by specific reference or phraseology, the limitation under the offense charged in the indictment is three years.

In anticipation that the government will argue that the six year limitation applies, exception 4 appears to be the only exception the government could claim. That provision provides, “for the offense of willfully failing to pay any tax, or make any return [ ] at the time or times required by law or regulation.” 26 U.S.C. § 6531(4). The indictment does not charge Dr. Hovind with willfully failing to pay a tax or make a

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return, rather the indictment specifically charges that during the times enumerated in counts 1 through 12, Dr. Hovind “did willfully fail to deduct, collect, truthfully account for and pay over to the IRS.” Indictment, 4. This charge is listed in the conjunctive, meaning Dr. Hovind had to deduct, collect, account and pay over. Section 6531(4) only covers when one is required to pay, “not to deduct, collect, truthfully account for and pay over.” Thus, the charge does not fit within the exception Congress listed. The indictment does not allege what law or regulation set the time required to pay a tax or file a return. Therefore, there are insufficient allegations to support an extension of the statute of limitations.

“Statute of limitations, both criminal and civil, are to be liberally interpreted in favor of repose.” *United States v. Phillips*, 843 F.2d 438, 443 (11<sup>th</sup> Cir.1988), *citing United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) and cases cited therein. The Supreme Court gave guidance in determining when a statute of limitations begins to run.

In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

*Toussie*, 397 U.S. at 114-15. When doubt exists about the statute of limitations in a criminal case, the limitations period must be construed in favor of the defendant.

*Habig*, 390 U.S. at 226-27.

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*States v. DiPetto*, 936 F.2d 96, 98 (2d Cir.), *cert. denied*, 502 U.S. 866 (1991). The *DiPetto* court specifically held,

The DiPettos violated 26 U.S.C. § 7201 by attempting to mislead or to conceal with respect to their tax liability and then willfully failing to file a tax return. Both elements were required to satisfy section 7201. In view of *Habig* we conclude that the statute of limitations did not begin to run until both of these requirements were met. Thus, the limitations period began on the day on which the tax returns were due. At that point both elements of a section 7201 violation had been established. The false W-4s had previously been filed and there existed a substantial tax deficiency. In reaching this conclusion we are in accord with several other courts which have held that a section 7201 prosecution involving the failure to file income taxes is timely if commenced within six years of the day of the last act of evasion, whether it is the failure to file a return or some other act in furtherance of the crime. *See, e.g., Williams*, 928 F.2d at 149; *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir.1986), *cert. denied*, 480 U.S. 950, 107 S.Ct. 1613, 94 L.Ed.2d 798 (1987) (if failure to file return is last act of evasion, the statute runs from the date the return and tax were due); *United States v. Crocker*, 753 F.Supp. 1209, 1214 (D.Del.1991) (in evasion action based on false W-4s and nonpayment of tax, statute begins to run from day that returns were due); *United States v. Sloan*, 704 F.Supp. 880, 883 (N.D.Ind.1989) (limitations period runs from date of last act of evasion, the failure to file taxes); *United States v. Sherman*, 426 F.Supp. 85, 89 (S.D.N.Y.1976) (completion of offense necessary to commencement of limitations period).

*Id.* As the Tenth Circuit correctly concluded, “We do not read these cases to stand for the proposition that the statute of limitations always commences at the point the defendant takes his final affirmative act to evade taxes. Rather, these cases are consistent with our holding that the statute of limitations in a § 7201 prosecution does not begin to run until the defendant has taken an affirmative act *and* incurred a tax deficiency.” *Payne*, 978 F.2d at 1179 n.2. Thus, a correct reading of all of the cases leads to the correct conclusion that the statute of limitations begins to run once all of the elements are met.

Section 6531 limits the time when indictments may be filed for the charged offenses to three years, unless it squarely meets an exception. Thus, there is no explicit language in section 6531 that makes the crime continuous. Further, the statute states, “For the purpose of determining periods of limitation . . . the rules of section 6513 shall be applicable.” 26 U.S.C. § 6531. Section 6513 does not provide for continuous crimes either. Thus, by the explicit wording of the statutes, there was no continuing offense, and the statute of limitations had run by 1999. Thus, the indictment was not timely and the government is barred from bringing the charge.

The Supreme Court warned, “we have before us a typical example of a situation where the Government, faced by the bar of the [three]-year statute, is attempting to open the very floodgates against which [we] warned. We cannot accede to the proposition that the duration of a [crime] can be indefinitely lengthened.” *Grunewald v. U.S.*, 353 U.S. 391, 404-405 (1957). This Court should dismiss the indictment with prejudice, as the charge is time-barred.

**III. COUNT 58 OF THE INDICTMENT SHOULD BE DISMISSED AS IT FAILS TO ALLEGE THE REQUIREMENTS OF A CRIME.**

Count 58 of the Indictment should be dismissed with prejudice inasmuch as the alleged facts are not a crime under the statute as a matter of law. The indictment alleges that Dr. Hovind violated 26 U.S.C. § 7212(a), in that he “did corruptly endeavor to obstruct and impede the due administration of the internal revenue laws by acts.”

Indictment, 9. These acts include: 1) filing bankruptcy against the IRS; 2) suing the IRS

for damages stemming from a “court-issued search warrant”; 3) seeking an injunction against a special agent of the IRS; 4) making threats of “harm” to “those investigating him and to those who may consider cooperating with their investigation”; 5) filing a complaint with TIGTA; 6) filing a criminal complaint against IRS special agents; 7) destroying records; 8) paying employees in cash and labeling them “missionaries rather than employees to avoid payroll tax and federal insurance contribution tax requirements.”

Indictment 8-9.

Section 7212(a) provides in part,

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both . . .

The Eleventh Circuit considered the meaning of the term "corruptly" as used in 26 U.S.C. ' (s) 7212(a). *United States v. Popkin*, 943 F.2d 1535, 1539-40 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992). In that case, the government claimed that “the plain language of the **second clause** of ' 7212(a) makes it clear that force and threats of force are not required under that part.” *Id.* That court specifically reviewed the statute and the legislative history, finding that “corruptly” was directly tied and not independent of the use of force or threats. *Id.* at 1543 (“The legislative history reveals that Congress intended only to prohibit interference with IRS agents, either through physical or verbal threats or through other actions which impeded their efforts to enforce the tax code.”). In reviewing Section 7212(a), it adopted the reasoning in *United States v. Reeves*, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985), and the conclusion that “‘corruptly’ is used for Motion to Dismiss Counts 1 through 12 and 58 - 17 - Of the Indictment

the purpose of ‘forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another.’” *Id.* at 1540. That court held that the use of “corruptly” in Section 7212(a) “gives clear notice of the breadth of activities that are proscribed.” *Id.* “The **first clause [corruptly]** **does require force or threats of force” to be alleged and proven.** *Id.* (emphasis added). The Eleventh Circuit thus requires the indictment to allege “force or threat of force” under the first part. In this case the indictment does not allege either force or threat of force. It just alleges “corruptly.”

“Threat of force” is defined in section 7212(a) as “threats of bodily harm to the officer or employee of the United States or to a member of his family.” It is also clear that if threat of force means threats of bodily harm then the term “by force” would mean by bodily harm.

**First**, filing bankruptcy against the IRS is neither a threat of force or force. It most certainly is not “forbidden,” and seeking relief from claims of the IRS in Bankruptcy Court is not an “act done with the intent to secure an unlawful benefit either for oneself or for another.”

**Second**, suing the IRS for damages stemming from a “court-issued search warrant” threatens no one personally and is an act done with the intent to secure a **lawful** benefit either for oneself or for another, not an unlawful benefit (unless the government is alleging that courts grant unlawful benefits).

**Third**, seeking an injunction against a special agent of the IRS qualifies as neither a threat of force or force. Seeking an injunction is an act done with the intent to secure a **lawful** benefit either for oneself or for another, not an unlawful benefit.

**Fourth**, making threats of “harm” to “those investigating him and to those who may consider cooperating with their investigation” is not the same as making “**threats of force**” to those investigating him and to those who may consider cooperating with their investigation. The government is fully aware of what section 7212 makes a crime and the word harm can only be within the meaning of section 7212 which must be alleged to be “bodily harm”. The indictment fails to allege what “bodily harm” or threat of such was made.

**Fifth**, filing a complaint with TIGTA qualifies as neither a threat of force or force. Seeking administrative relief is an act done with the intent to secure a **lawful** benefit either for oneself or for another, and not an unlawful benefit.

**Sixth**, filing a criminal complaint against IRS special agents qualifies as neither a threat of force or force. Making the government aware of actions Defendant believes in violation of federal laws is an act done with the intent to secure a **lawful** benefit either for oneself or for another, and not an unlawful one.

**Seventh**, destroying records, even if true, qualifies as neither a threat of force or force. The alleged act of destroying records in no way secures any benefit to the Defendant or for any other person.

**Eighth**, paying employees in cash and labeling them “missionaries rather than employees to avoid payroll tax and federal insurance contribution tax requirement” qualifies as neither a threat of force or force. Avoiding any tax is an act done with the intent to secure a **lawful** benefit either for oneself or for another.

None of these allegations denote the use of force or threat of force, and as such do not meet the requirements for a charge under 26 U.S.C. §7212(a). Therefore, count 58 of Motion to Dismiss Counts 1 through 12 and 58 - 19 -  
Of the Indictment

the Indictment is wholly without factually or legal support and must be dismissed with prejudice.

### CONCLUSION

THEREFORE, based on the foregoing, Defendant Kent E. Hovind respectfully requests that this Court DISMISS WITH PREJUDICE counts 1 through 12 and 58 in the indictment.

Respectfully submitted this 27th day of September, 2006.

/s/ Alan S. Richey  
Alan Stuart Richey  
Counsel for Kent E. Hovind

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did electronically file the foregoing motion using the court's CM/ECF system which will send notice of the filing to the attorney of record for the plaintiff, Michelle M. Heldmyer, and any other counsel of record through the CM/ECF system.

Dated this 27<sup>th</sup> day of September, 2006.

/s/ Alan S. Richey  
Alan S. Richey