

LINDSEY SPRINGER on 11/19/2011 9:11:33 PM wrote  
PETITION FOR REHEARING AND FOR REHEARING EN BANC

Lindsey Kent Springer ("Petitioner") Petitions the Panel for Rehearing pursuant to Federal Rules of Appellate Procedure (FRAP) Rule 40 for Panel Rehearing and for Rehearing En Banc pursuant to FRAP Rule 35.

1. The Panel decision conflicts with the Supreme Court in *Dole v. United Steelworkers of America*, 494 U.S. 26, 32-33 (1990), as accepted by this Court in *U.S. v. Collins*, 920 F.2d 619, 630 (n.12-13)(10th Cir. 1990), *U.S. v. Dawes*, 951 F.2d 1189, 1192 (10th Cir. 1991), *U.S. v. Chisum* 502 F.3d 1237, 1243-44 (10th Cir. 2007), *Springer v. IRS, ex rel 231 Fed. Appx 793, 795-99* (10th Cir. 2007), *Lewis v. CIR*, 532 F.3d 1272, 1275 (10th Cir. 2008), and *Springer v. CIR*, 580 F.3d 1142, 1143-45 (10th Cir. 2009) and consideration by the Panel first, and then by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

Springer relied upon the unanimous words by this Court and the Supreme Court in the cases cited above, as well as the words by Act of Congress in the Paperwork Reduction Act of 1980 and 1995, the Commissioner's published words, the Office of Management and Budget's Regulations, and the Grand Jury indictment, to raise the public protection under Title 44, Section 3512(a), which among others, directs no law withstands the protection Congress gave the public and any approval number on any information collection request form must be "in accordance with" the entire Act of Congress.

In *Dole*, the Supreme Court held "tax forms" were "typical" information collection requests subject to the public protection. In *Collins*, this Circuit applied the public protection to charges under 26 U.S.C. 7201 (evasion) where the theory of evasion involved the failure to file income tax returns. 920 F.2d at 630 (n.12-13).

In *Chisum*, this Court held:

"The PRA...precludes the imposition of any penalty against a person for 'failing to comply with a collection of information' if either (1) it does not display a valid control number or (2) the agency fails to alert the person that he or she 'is not required to respond to the collection of information unless it displays a valid control number.. 44 U.S.C. 3512. A 3512(a) defense may be raised at any time. See ID. 3512(b). Tax Forms are covered by the PRA. See *Dole v. United Steelworkers of Am.* 494 U.S. 26, 33...(1990)." 502 F.3d at 1243. *Chisum* relies upon *Collins*, 920 F.2d at 630 (n.12-13). *Chisum* is a criminal case in which this Court held the PRA applies to failing to file tax returns but not filing false returns. *Id.* The *Collins* Court stated to the public:

"But because the provision of information in 1040 is inexorably linked to the statutory requirement to pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct." *Id.* n.13

Collins also provided that this Court's decision in *U.S. v. Tedder*, 787 F.2d 540, 542-43 (10th Cir. 1986) that had held tax forms were not subject to the PRA because the filing of tax returns was obligatory, held the decision in *Dole* "superceded" *Tedder*:

"including Federal Income Tax Returns within the category of information collection request under the Act."

920 F.2d at 630 (n.12); See Springer's revised brief at 14

In *Lewis v. CIR*, 523 F.3d 1272, 1275 (10th Cir. 2008), this Court relied on Collins and reaffirmed the PRA applies to tax returns. The Lewis Court continued to rely upon Collins in its explanation of the difference between the 1980 and 1995 changes to the PRA. *Id.* at 1277. In *Springer v. CIR*, 580 F.3d 1142, 1144 (10th Cir. 2009), this Court held again that the PRA applies to any penalty "based upon Mr. Springer's failure to file form 1040s." It is undeniable that all Six Counts of the Grand Jury indictment are based upon the allegation Springer failed to file "Form 1040" "U.S. Individual Income Tax Returns." In *Springer v. U.S. ex rel.*, 231 Fed. Appx. 793, 800 (10th Cir. 2007) this Court imposed filing restrictions because Springer sought public protection of the PRA, as a Plaintiff, to "bar" the IRS from subjecting Springer to penalties due to the claim Form 1040 did not comply with the PRA. This Court held the protection could only be raised as a defense. *Springer III* was about a "criminal" investigation. *Id.*

The Panel in 10-5055 has decided the PRA does not apply to penalties based upon Springer's failure to deliver Form 1040 U.S. Individual Income Tax Returns, as alleged by the Grand Jury in each Count, finding:

"there is no substantive obligation or crime arising out of Form 1040 itself. See *United States v. Gross*, 626 F.3d 289, 295-96 (6th Cir. 2010)"

Order at 9. Even the 6th Circuit in *Gross* acknowledged this Court's Collins decision at 626 F.3d at 295 (n.5). Another case the Gross Court referred to from this Court, *U.S. v. Dawes*, 951 F.2d 1189, 1192 (10th Cir. 1991), and to which the Panel decision relies, clearly and unmistakably states:

"The 1040 Form is the information collection request which....must comply with the PRA. It is through the 1040 Form that the government obtain all the tax information it requires...providing the information required by the 1040 Form....As long as the 1040 Form complies with the Act, nothing more is required."

Instead of going with the Dawes dictum to the holding, the Panel places Springer's liberty upon a passing contradictory statement of inclination. The Panel decision ignores the term "return" in both 6012 and 7203 is neither defined by Congress of the Secretary of the Treasury

(SOTT). The Panel ignores 26 CFR 601.104(a) where the SOTT requires use of "prescribed forms" and where Form 1040 is the prescribed form of return under both section 6011 and 6012.

The Grand Jury indictment alleged Form 1040 were not filed in Count One and "U.S. Individual Income Tax Returns" "required by law" were not delivered timely to the place "required by law." Doc. 2, Counts Two, Three, Four, Five and Six. Even the expert for the Tax Division testified under oath to the Jury Springer was required to determine the required form and place of delivery. Doc. 390, 1302, ln. 11-16

The Panel decision conflicts with Chisum which held false returns were not protected by the PRA. 502 F.3d at 1244. The Panel decision suggests filing "faulty information on a non-compliant IRS form" is covered by the PRA. Order at 9. The Commissioner of Internal Revenue (CIR) informs the public on his application to the Office of Management and Budget (OMB) application, the Form 1040 U.S. Individual Income Tax Returns are requested under 26 U.S.C. 6011 and 6012. Doc. 396, 2671, 18-21. The CIR directs tax returns are subject to the PRA and OMB approval, and that if the Form 1040 does not comply, the public may refuse to provide the information without threat of penalty. Id. Dole noted the public is not subject to penalty on bootleg forms. The Panel admits Form 1040 does not comply, by not saying that it does, in addressing Springer's claims of deficiencies. The Form 1040 does not display an OMB control number "issued in accordance with the" PRA. See 3512(a). The Form does not comply with 3506(c)(1)(B)(ii)(I,II,III,IV,V) and fails in every required under 5 CFR 1320.8(b)(3). See Springer's revised brief pg. 14-19

The Panel decision fails to consider 3512's mandate begins "NOT WITHSTANDING ANY OTHER PROVISION OF LAW..." Springer, 580 F.3d at 1143. The Panel also leaves off the phrase "assigned by the Director in accordance with this chapter." Order at 8; Id.

Willfully is an element in each Count of the Grand Jury Indictment. Springer relied upon Dole, Collins, Dawes, as explained in Chisum, Springer III, and Springer (2009). Springer also relied upon words of the Commissioner, Regulations of Congress, the SOTT, and the ultimate fact Form 1040 did not comply with the PRA to govern Springer's decision to stand on the public protection mandate of Congress. After many cases Springer has claimed the PRA protection, the Panel now says Springer should have relied upon the published words of this Court and the Supreme Court.

Recently, two members of the Panel decided 10-5037, claiming Springer's Counsel was aware of tax protestor jurisdictional challenged had been repeatedly rejected by the Tenth Circuit. Citing *Lonsdale v. U.S.* 919 F.2d 1440, 1448 (10th Cir. 1990) and *U.S. v. Ford* 514 F.3d 1047, 1053 (10th Cir. 2008), the Panel in 10-5037 and 10-5055 (order at 7) direct these cases

control claims derived from the Panel's "now defunct" abolished Internal Revenue Districts and District Director Offices, Order at 7; but never address Collins, Chisum, or in substance, Dawes, Dole, and both Springer cases.

The Panel decision the PRA does not apply to the charges in each of the six counts should be reversed by this Court, either on rehearing or en banc, as it was contrary to law in every respect, and most importantly, contrary to the Grand Jury's charges in all Six Counts. The Tax Division convinced the Grand Jury to a specific Form 1040 U.S. Individual Income Tax Return and which relied upon regulations "required by law." Doc. 104. The Court should reverse the District Court's decision to deny dismissal.

2. The Panel decision conflicts with decisions of the United States Court of Appeals for the Tenth Circuit in U.S. v. Brewer, 486 F.2d 507, 509 (10th Cir. 1973) and U.S. v. Taylor, 828 F.2d 630, 634 (10th Cir. 1987) and consideration by the Panel first, and then by the full Court, is therefore necessary to secure and maintain uniformity of the Court's decisions.

For over 50 years, the requirement to deliver Forms of Returns prescribed by the Secretary required under 26 U.S.C. 6011 and 6012, fell under 26 U.S.C. 6091(b) and never as the panel holds, under 6091(a). The Panel decision relied upon language from 6091(a) explaining "the Secretary of the Treasury is authorized under 26 U.S. C. 6091(a) to promulgate regulations prescribing the place for the filing of any return..." Order at 7. It was GREAT to read the Panel accept the undisputed fact all Internal Revenue Districts and District Director Offices are "now defunct." Order at 7. The Panel's decision relying upon 26 U.S.C. 6091(a), instead of 6091(b), is in error and conflicts with previous holdings by this Court in Brewer and Taylor, and the authorities cited therein. Section 6091(a) reads in relevant part:

"When not otherwise provided for by this Title, the Secretary shall by regulations prescribe the place for filing of any return..."

Subsection 6091(b) reads in relevant part:

"(b) TAX RETURNS. In the case of Returns of tax required under authority of Part II of this subchapter [26 U.S.C. 6011 et seq.]..."

There is no doubt the Grand Jury theory relied upon 6091. See Doc. 104. The Panel decision, in rejecting the Form 1040 U.S. Individual Income Tax Returns were subject to the PRA, found Springer's duty to deliver said "Tax Returns" derived from 6012 and 7203. Order at 8-9. The Panel incorrectly placed section 6012 under 6091(a) and not 6091(b). Section 6012 clearly falls under "returns of tax required under authority of Part II of this subchapter [26 U.S.C. 6011, et seq]." Section 6012 falls under Part II of this subchapter. The duty to pay derives from 6151. See Doc. 104, pg. 2; See also *Hollywell Corp v. Smith*, 507 U.S. 47, 52 (1991). The

Supreme Court found "the Internal Revenue Code ties the duty to pay Federal Income Taxes to the duty to make an income tax return." In Collins, this Court followed 6151's language finding "the provisions of information in 1040 is inexorably linked to the statutory requirement to pay taxes." 920 F.2d at 630 (n.13)

The Panel's 6091(a) finding and application conflicts with both Brewer and Taylor where this Court held:

"requirement concerning the place of filing of the individual income tax returns is provided in 26 U.S.C. 6091(b)(1)(A)..."

Besides the Panel decision's 6091(a) theory being in direct conflict with Brewer and Taylor, that theory conflicts with the laws written by Congress and given notice to the public. Section 6091(a) begins "When not otherwise provided by this title" and 6091(b) is "otherwise provided." Both Brewer and Taylor direct the duty:

"a return...shall be made to the Secretary (i) in the internal revenue district in which is located the legal residence....of the person making the return..."

Id. quoting 6091(b)(1)(A)(i).

Springer relied upon Brewer, Taylor, Collins and Hollywell, as well as the direct language of Congress' 6091(a) and (b), in his good faith belief and defense as a matter of law. In Cheek v. U.S. 498 U.S. 192, 201 (1991), the Supreme Court directed the exception to the rule ignorance of the law is no excuse for violating the law, in willful violations of the tax laws, required the government to prove (1) the law imposed a duty on Springer, (2) Springer knew of this duty, and (3) and Springer voluntarily and intentionally violated that duty. See also Chisum, 502 F.3d at 1241. This rule's exception was further clarified in Bryan v. U.S. 524 U.S. 184, 198 (1998), citing Cheek, saying the jury must find Springer was aware of the specific provision of the tax code he was charged with violating. That did not happen in this case regarding 6091(a).

In Brewer, the Tenth Circuit said 6091(b) is "essential to establishing jurisdiction and venue." 486 F.2d at 509. In U.S. v. Lombardo, 241 U.S. 73, 77 (1916), the Supreme Court held "when the gist of the offense is failure to file the offense is where the office is fixed." Venue and Jurisdiction is where the agency is authorized by law to act. Armour Packing v. U.S. 209 U.S. 56, 76 (1907). In Johnston v. U.S. 351 U.S. 215, 220 (1956) the Supreme Court held "the place fixed for performance fixes the situs of the crime."

This Court should reverse the Panel's reliance upon 6091(a) and citing to regulatory authority for "tax returns" as that authority does not exist due to 6091(b) and its direction to both internal revenue districts and district directors the Panel found were "now defunct." Order at 7. This Court should, after de novo review, dismiss each Count of the indictment for being in

violation of Article III, Section 2, Cl.3 for lack of venue, jurisdiction, good faith, lack of evidence of willfulness under the 6091(a) theory, and for lack of subject matter jurisdiction, due to the now admitted internal revenue districts and district director offices were abolished and defunct by calendar year 2000.

3. The Panel decision conflicts with Article I, Section 9, Cl. 3 and the Supreme Court's decision in *Calder v. Bull*, 3 Dall 386 (1798), and *Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994) and consideration by the Panel first, and then the full court, is therefore necessary to secure and maintain uniformity of the Court's decisions.

The Panel decision applies a Treasury Regulation that did not attempt to comply with Federal Register requirements involving public involvement and opportunity to comment, under 26 CFR 1.6091-2(9.16.04), to allege conduct that took place from calendar year 2000 through 2005. The issue is where was the place Springer was "required by law" to deliver Form 1040 U.S. Individual Income Tax Returns for the Secretary and where to deliver payment of any tax shown owed therein for Calendar years 2000 through 2005. Doc. 2 (indictment).

The Panel cited to wording from 26 CFR 1.6091-2 which says:

"requires individuals to file returns with 'any person assigned the responsibility to receive returns at the local internal revenue service office that serves the legal residence...of the person required to make the return.'" 1.6091-2(a)[2004]

The version of this regulation during 1999 to 2004 reads:

"Income Tax Returns of individuals...shall be filed with the district director in which is located the legal residence...of the person required to make the return..."

See *Allnutt v. CIR*, 523 F.3d 408, 412 (4th Cir. 2008); citing the 1997 version which remained the same till the proposed changes in September 2004. The Tax Division explained to the Panel:

"Since 2004, the Treasury Department Regulations have required individual taxpayers to file at their local IRS Office or at any IRS service center specified...or at an IRS service center applicable."

Gov. Brf. at 18; cited by Springer in Reply at 17. The Panel should rehear and reconsider its applying 26 CFR 1.6091-2(2004) to calendar year 1999 to 2005 and dismiss Counts One, Two, Three, Five and Six, as the Treasury Regulation 26 CFR 1.6091-2 for 1999 to and through 2004 mirrored 26 U.S.C. 6091(b) and required delivery of both payment and the return at the district director office of the internal revenue district of legal residence to which the Panel has already found, as the *Allnutt* Court so found, that all revenue districts and director offices were abolished and no longer exist. That clause of 6091(b) which directs by regulations does not help

because 1.6091-2(1999 to 2004) directs Baltimore Maryland and not anywhere in Oklahoma. Allnutt, 523 F.3d at 408 (n.1); Order at 7

Count Five should be dismissed for the same reasons and due to the law being confusing and very unclear in light of the now defunct revenue districts and director offices. Springer is unclear how completely abolishing districts and directors was not a substantive change. The ex post facto clause flatly prohibits retroactive application of penal legislation. Landgraf, 511 U.S. at 266-67. "Fair warning" is the test." Springer was never given notice to the meaning of many things and that 1.6091-2 was changed in 2004 to apply to conduct in 1999 to 2004 was not lawful.

The Court should reverse its decision to apply 1.6091-2 to any conduct at issue in the charges as section 6091(b) controls, but to the extent any regulation would have controlled, the 2004 changes to 1.6091-2 applied to conduct from 1999 through 2004 would violate the ex post facto clause and in conflict with Calder and Landgraf.

4. The Panel decision conflicts with Hughes v. U.S. 953 F.2d 531, 542 (9th Cir. 1992) and involves a question of exceptional importance in need of this Court's consideration.

The Hughes Court found the only statute allowing to the SOTT to exercise his office outside the District of Columbia, under Title 4, 72 was 26 U.S.C. 7621(a) and (b). Order at 6. The Panel acknowledges what Congress mandates but then refuses to endorse Hughes or the application of 7621. Hughes found the President must establish internal revenue districts and the Panel here found those defunct (in 2000). Order at 7 The SOTT's office is established at 31 U.S.C. 301 in the District of Columbia and the Hughes Court held:

"to establish internal revenue districts and these districts can be created outside Washington D.C."

953 F.2d at 542

This Court said in Codner v. U.S. that 26 U.S.C. 7601 conveys "board authority" to the SOTT. 17 F.3d 1331, 1333 (10th Cir. 1994). Under 7601 Congress "required the Secretary to canvas revenue districts." U.S. v. LaSalle, 437 U.S. 298, 308 (1978); See also Donaldson v. U.S. 400 U.S. 517, 534 (1971) citing 7601. See also U.S. v. Bisceglia, 420 U.S. 141, 145 (1975) explaining the SOTT proceeds through "internal revenue districts." The Panel's decision does not cite to which statute or law it relied upon to allow the SOTT to exercise his office outside D.C. and within the State of Oklahoma. Order at 7

The Panel decision is in direct conflict with Hughes and renders meaningless current statutes and regulations which relies upon the President establishing "convenient" internal revenue districts. Even though this Court has now found the revenue districts are "defunct," it

has continued to refer and rely upon them to deny litigants standing for lack of jurisdiction for other reasons. Most recently, in *Green v. U.S.*, U.S. App. Lexis 13652 (10-5133)(10th Cir. 2011) holding taxpayer must file claim under 26 CFR 301.6402-2(a)(2) in the "service center" of the "internal revenue district" as "jurisdictional requirement." See *Crump v. U.S.* 39 Fed. Appx. 556, 558-9 (10th Cir. 2002)("relevant district director"); *March v. IRS*, 335 F.3d 1186, 1189 (10th Cir. 2003)(assessments are sealed by "district director"); *U.S. v. Dawes*, 161 Fed. Appx. 743, 745 (10th Cir. 2005)(refusing to address SOTT must establish internal revenue districts without cited authority); *Goodman v. U.S.* 185 Fed. Appx. 725, 728-29 (10th Cir. 2006) ("according to the government the district IRS Form 4340 is an official form"); *People Source Int'l v. U.S.* 198 Fed. Appx. 776, 779 (10th Cir. 2006)(finding District Court lacked "subject matter jurisdiction" based upon Peoples claims were not submitted "to the district director of the district having jurisdiction over the dispute.") Recently, two members of the Panel, who authorized the 2011 decision in *Green*, in 10-5037, referred Petitioner's counsel for suspension to practice for challenging the District Court's jurisdiction solely based upon the "now defunct" internal revenue districts and districts offices. He was suspended on September 28, 2011. See 11-316.

This Court should reverse the Panel's decision to ignore section 7621 and the jurisdictional challenges created by abolished revenue districts and director offices after 1999, which thus far no other specific statute or other law has anyone identified allowing the SOTT to exercise his office outside D.C. and within the external boundaries of Oklahoma.

5. The Panel decision conflicts with the decisions in the Supreme Court in *U.S. v. LaSalle*, 437 U.S. 298, 308-317 (1978), *U.S. v. Williams*, 504 U.S. 36, 47 (1992)), and another panel's decision in *Springer v. Albin, et al.*, 09-5088 (10th Cir. 2010) and consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions.

This Court found in *Albin* the IRS as of September 16, 2005, was conducting an institutional criminal investigation. Doc. 01018515811. This Court found "on September 16, 2005, the [IRS] agents [were] executed a search warrant at Mr. Springer's home as part of an investigation." This decision was premised upon the agent declarations. *Id.* at 7. These declarations became part of the record in this case. Doc. 75-19, pg. 2-3; See also Reply herein at 2

This Panel clearly finds the institutional referral took place on June 3, 2005. See Order at 4 and 10. The Panel confused the bright line by explaining the search was conducted "by the government." Order at 4. A Grand Jury is not "the government." See *U.S. v. Williams*, 504 U.S. 36, 47 (1992). The Panel agrees the IRS's enforcement authority ceased by June 3, 2005.

The Grand Jury's most important function is to remain a buffer or referee between the United States prosecutor and the suspect or accused. *Stirone*, 361 U.S. at 218.

In the denial of Springer's suppression requests, the District Court order was upheld by the Panel stating:

"On June 3, 2005, the IRS referred Mr. Springer to the Justice Department to investigate potential criminal tax violations." Order at 4

The Panel continued:

"On September 16, of that year [2005] the government executed a search warrant of Mr. Springer's residence." *Id.*

There is no doubt the letter offered as a referral explains the request came from the Assistant U.S. Atty. Doc. 80-1; 80-9; 224-6. In *LaSalle*, the Supreme Court found the IRS cannot try its prosecutions. 437 U.S. at 312. Any referral must be institutional. *Id.* at 313. The *LaSalle* rule applies "solely to the statutory scheme of the internal revenue code in which the IRS civil authority ceases...upon referral of taxpayer's case." *SEC v. Dressler*, 628 F.2d 1368, 1378 (en banc)(D.C. Cir. 1980). It is the code itself that terminates the IRS's investigative authority on referral. *Linda Thompson v. Resolution Trust*, 5 F.3d 1508, 1518 (D.C. Cir. 1993); citing *LaSalle*. The Tenth Circuit in *U.S. v. Anaya* 815 F.2d 1373, 1377 (10th Cir. 1990) found the IRS was "inhibited" after referral. This would, under the Panel decision, be June 3, 2005. The Commissioner is under well known restraints. *Bedarco v. CIR*, 464 U.S. 386, 399 (1983). The Tax Division stated the "IRS asked permission from the Tax Division to expand an existing ...grand jury investigation." *Opp. Brf.* at 12. The Panel decision rejected the prophylactic rule and held "therefore no need to suppress evidence obtained before these dates." Order at 10. The Panel admitted the search took place on September 16, 2005, some three months after in institutional referral. The Panel admits the indictment and verdict were obtained unlawfully:

"during the course of the investigation, defendants denied receiving any income." Order at 4

These "statements" were obtained after June 3, 2005. See Doc. 2, pg. 3,4 and 7 (indictment). The Government did not execute the search warrant as the Panel stated but rather special agents of the IRS claiming enforcement authority under 26 U.S.C. 7608(b) which they did not have after June 3, 2005, if the Panel decision is accepted. Other evidence showed a grand jury receiving income tax information on Springer and Stilley on October 6, 2004.

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Doc. 224, 226, which the Panel decision never addresses. This Court should reverse the Panel's decision as it clearly conflicts with LaSalle, Anaya, and decisions by other Circuits prohibiting the IRS's conduct after June 3, 2005, up until this day.

6. The Panel decision conflicts with decisions by the Supreme Court in *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948), *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *Farretta v. California*, 422 U.S. 806, 835 (1975), *Patterson v. Illinois*, 487 U.S. 285, 298 (1988), and *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

The Panel decision found Springer waived his Sixth Amendment Right to trial counsel. Order at 15. The Panel premised its decision upon the April 22, 2009 motions hearing. Order at 14. Trial was held 6 months later beginning on October 26, 2009. The Panel finds the waiver was obtained by both Springer and Stillely simultaneously. Order at 14. Farretta requires the trial judge to do the inquiry. 422 U.S. at 835. The Presumption is against waiver. *Von Moltke*, 322 U.S. at 723. The Court was to make a penetrating and comprehensive examination of all the circumstances of the plea being tendered. *Von Moltke* at 723-24. The District Court was not found by the Panel to have discussed any defenses, or penetrating inquiry of Springer. The 10 minute discussion at a hearing on motions show the disregard of the Court's duty.

In Iowa, the 6th Amendment "safeguards" were required applies "at all critical stages of the criminal process." 541 U.S. at 81. There is a "range of case specific factors" the waiver depends on. *Johnson*, 304 U.S. at 464. The Court required at "each stage of the proceedings" the Trial Judge to "determine the scope of the sixth amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Patterson*, 437 U.S. at 298. The Panel decision makes no finding of any "stage" and just one short 10 minute hearing. Order at 14. The Panel makes no specific findings and there was no warnings. The warnings are to be "rigorous" and less substantial at pretrial than "they are at trial." *Id.* at 299; *Iowa* 541 U.S. at 90. The Trial Court did not understand the charges as of July 2, 2009. Doc. 115, 125, ln. 11-21 ("what provision should I be looking at here")

The Panel decision that Form 1040 U.S. Individual Income Tax Returns were not at issue, Order at 8-9, is not what the Grand Jury alleged. Doc. 2. The Trial Court in the middle of trial decided:

"in fairness...that I provide some preliminary thoughts as to the ground rules...that govern the defendant's presentation of their evidence." Doc. 391, 1595, ln. 15-17

Petitioner sought understanding about subpoenas for witnesses secured under the 6th Amendment and was denied. Doc. 382, 13, ln. 22-25

This Court should reverse the Panel decision on rehearing, or sitting en banc, as it conflicts with numerous settled precedent of the Court.

7. The Panel decision conflicts with *CIR v. Duberstein*, 363 U.S. 278, 284-288 (1960), *Groman v. CIR*, 302 U.S. 82, 86 (1937), *Colautti v. Franklin*, 437 U.S. 379, 392-93 (1979), and *Burgess v. U.S.*, 553 U.S. 124, 128 (2008) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

The Panel erroneously concluded that the Court gave the "jury the task of determining whether any transfers were gifts or income." Order at 11. The Panel's one or the other theory contradicts the findings of "gross income" and "taxable income" both being reduced by "gifts." *Id.* In *Groman*, the Supreme Court limited defined terms to their meaning when "means" is used. 302 U.S. at 86. *Burgess*, 553 U.S. at 128. The district court provided the definition of "gift" as a matter of law at the end of trial. The *Duberstein* holding specifically instructed trial courts they must "be careful not to allow trial of the issue whether receipt of a specific payment is a gift to turn into a trial of the tax liability." 363 U.S. at 289. Yet, this is what the Trial Court did.

The *Duberstein* decision also directed their decision not to define "gift" judicially was based on the thought "that these propositions are not principals of law but rather maxims of experience." *Id.* at 287. The Panel decision endorses the District Court's instruction to the jury on "gifts", as a matter of law, in direct opposition to *Duberstein's* holding.

This Court should reverse the Panel's decision on rehearing, or sitting en banc, as it conflicts with numerous settled precedents of the Court.

8. The Panel decision conflicts with a decision of this Court in *U.S. v. Meek*, 998 F.2d 776, 781 (10th Cir. 1993) and consideration by the full court is necessary to maintain uniformity with this Court's decisions.

The Panel decision rejects the difference between civil and criminal violations of the internal revenue code in its consideration of tax loss and restitution derived from years outside the charges, including finding taxes owed on failure to file claims, and both *Stilley's* liabilities that are not at issue, and state taxes of both *Springer* and *Stilley*. There was no finding or evidence presented to the Jury or Court in support of the civil conduct and *Meeks* prohibits the Panel's conclusions.

This Court should reverse the Panel's decision (at 16-17) on rehearing, or sitting en banc, as it conflicts with *Meeks* and cases cited therein.

9. The Panel decision conflicts with decisions by the Supreme Court in *James v. U.S.* 366 U.S. 213, 219-220 (1961) and in *U.S. v. Swallow*, 511 F.2d 514, 523 (10th Cir. 1975) and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

Count Five is alleged vaguely as tax evasion and at trial the prosecution presented evidence Mr. Turner loaned Springer \$ 250,000.00 from Mr. Turner and evidence Springer paid payments from May, 2006, until November, 2008, when Springer could no longer make those payments dealing with the case at issue in 10-5037. Evidence also showed Mr. Turner held a lien interest in the RV to which was purchased entirely by the loaned funds. The Panel ignores the issue and construes the loan as gross income regarding \$ 250k loan and decided it was an exercise of fraud. The Court enhanced Springer's sentence 3 different times with this transaction. In *James*, the Supreme Court held "the standard...of gross income...excludes loans." 366 U.S. at 219-20. See also *Swallow*, 511, F.2d at 523 ("a loan agreed to be repaid does not constitute gross income.") The "issue is a right to recoup." *James*, at 217.

This Court should reverse the Panel's decision on rehearing, or sitting en banc, as it conflicts with *James* and *Swallow*.

#### CONCLUSION

Petitioner request the Panel rehear and reverse and if not then Petitioner requests rehearing en banc to address each conflict herein.

/s/ Lindsey K. Springer 11.5.11