

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

United States of America,	}	
Appellee,		Case No. 10-5057, 10-5055
vs.		(D.C. No. 4:09-cr-00043-SPF-2)
Oscar Amos Stilley,		
Appellant	}	

---

PETITION FOR REHEARING AND FOR REHEARING EN BANC, AND ADOPTION  
OF SPRINGER'S PETITIONS FOR REHEARING AND REHEARING EN BANC

Comes now Oscar Amos Stilley, (“Stilley”), and for his petition for rehearing and rehearing en banc, and the aforesaid adoption, and states:

The panel decision conflicts with decisions of the United States Supreme Court and the 10th Circuit, to which this petition is addressed, and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision. Conflicting decisions include but are not limited to:

Foy v. US, \_\_\_ F.3d \_\_\_ #09-3314, 2011 US Ap. Lexis 10362 (10th Cir. May 23, 2011); Bryan v. US, 524 US 184 (1998); Cheek v. United States, 498 US 192 (1992); Ex Parte Hull, 312 US 546 (1941); Jerome v. United States, 318 US 101 (1943); Johnson v. Avery, 393 US 483 (1969); Procunier v. Martinez, 416 US 396 (1974); US v. Stemm, 635 F.2d 732 (1987); Facet Enters. v. NLRB 907 F.2d 963 (10th Cir. 1990); US v. Stillhammer, 706 F.2d 1072, 1075 (10th Cir 1983); and, Ford v. US, 639 F.3d 718 (6th Cir. 4-14-11 (matter of extraordinary importance).

ADOPTION AND INCORPORATIONS

Stilley adopts the petitions for rehearing and rehearing en banc, by Lindsey

Springer, as if herein set forth word for word. 2) Stilley incorporates all parts of this petition into all other parts of the petition. 3) To the extent not legally forbidden, and to the extent that reversal and dismissal is not otherwise granted, Stilley incorporates herein his motion, contemporaneously filed, asking that his case be maintained upon the docket pending the exhaustion of administrative remedies, and litigation of the result, with respect to his request for reasonable access to the courts.

THE GOVERNMENT AS WELL AS THE PANEL CONCEDE THAT STILLEY COMMITTED NO ACTS WITHIN THE NORTHERN DISTRICT OF OKLAHOMA SUFFICIENT TO ESTABLISH VENUE, AND THAT NO ACTS OF SPRINGER ARE CHARGEABLE TO STILLEY FOR PURPOSES OF VENUE

Stilley mailed a letter to the clerk indicating an intention to argue *Foy v. US*, supra, at the oral argument of this cause. The letter arrived the day after the panel decision was filed.

In *Foy*, the 10th Circuit noted "our review of the record uncovers absolutely no evidence that Mr. Foy committed any act in the District of Kansas. In fact, the government does not argue that it presented such evidence." The *Foy* court analyzed the legal issues as follows:

"[V]enue is a right of constitutional dimension, [which] has been characterized as an element of every crime." *United States v. Miller*, 111 F3d 747, 749 (10th Cir. 1997). "Venue in federal criminal cases is an element of the prosecution's case which must be proved, unlike the other elements, to the preponderance of the evidence. *Id.* at 749-50 (quotations omitted). Although venue is a question of fact to be decided by the jury, "[w]hether there has been sufficient evidence to justify a finding on venue is a question of law for the court." *Id.* at 749 (quotations omitted).

Venue is generally proper "in a district where the offense was committed." Fed. R. Crim. P. 18; see also U.S. Const. art. III, section 2, cl. 3 ("The Trial of all Crimes...shall be held in the State where the said Crimes shall have been committed.") U.S. Const. amend. VI (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED.") (emphasis added). ....

The government cited to *United States v. Callwood*, 66 F.3d 1110, 1115 (10th Cir. 1995) for the proposition that "a litigant who mentions a point in passing but fails to press it by supporting it with pertinent authority...forfeits the point." The government thereupon, at brief pages 47-48, disparaged five arguments on the theory that they were not adequately briefed by the appellants or either of them. The government then provided a brief rebuttal to each points, concluding at the middle of 49. The question of venue was NOT one of them. Respecting venue the government argued:

Page 19 "...these crimes were committed while Springer lived in the Northern District of Oklahoma, making venue proper. See *United States v. Garman*, 748 F.2d 218, 220 4th Cir. 1984) (in a failure-to-file case, "venue is proper in either the district of residence or the district where the service center is located").

Page 20 "the elements of 7201 are willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax."

Stilley didn't live in the Northern District of Oklahoma (NDOK). Brian Shern admitted at TR 1848 that they were "looking at [Stilley] for tax evasion, although we didn't have venue for that charge."

The government at page 19 confessed the theory upon which it actually relies - namely the wholesale abolition of the constitutional mandates regarding venue. Specifically, the government said "...even if there were no laws requiring Springer to file his tax returns in the Northern District of Oklahoma, the indictment would still be sufficient and his (and Stilley's) convictions would still be valid." The government's theory irreconcilably conflicts with Foy.

Both Appellants objected on grounds of insufficient brief length. In contrast, the government blithely states, at the end of its brief, 1) that it doesn't need any greater brief length, and 2) that it doesn't desire oral argument. The government didn't WANT to say anything about the question of venue on Stilley, because their feeble efforts to maintain a claim of venue on Springer amounted to an admission that no venue existed against Stilley.

The government had 346 additional words remaining with which to state their position with respect to venue on Stilley, if they had a non-frivolous position with respect to venue, as to any count applicable to Stilley.

Federal Rules of Appellate Procedure (FRAP) 34 (a)(2) provides that "Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and the record unanimously agrees that oral argument is unnecessary for any of the following reasons. (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument."

Springer argued that 4 USC 72 actually means what it says when it declares the federal government to have no power outside Washington, DC, save those powers delegated by Congressional statute. The panel characterized this as a "delegation argument." The panel denounced the delegation argument as "patently frivolous."

Stilley of course does not concede that said argument is frivolous, patently or otherwise. However, the panel cannot with any semblance of rationality and honesty address this "patently frivolous" argument and ignore Stilley's irrefutable venue argument.

This Court in *US v. Stemm* 635 F.2d 732 (10th Cir. 1987) declared that "Counsel and litigants are entitled to rely on the notion that this court will precisely follow its own rules in every case before it."

The government expressly conceded Stilley's right to adopt Springer's arguments, and to incorporate additional arguments including but not limited to those set forth in the motion for judgment as a matter of law and new trial, which were totally ignored by the District Court. The panel likewise conceded the same, saying at footnote three that it would "specify when we address Mr. Stilley's independent contentions."

The panel decision states plainly at notes 5 and 6 that it is "unclear" to what extent Mr. Stilley joins Mr. Springer on specific arguments. The panel cannot consistent with *Stemm* have it both ways. If the panel does not adequately understand the arguments of a

litigant with respect to any matter that might affect the outcome, the rules mandate that oral argument MUST be allowed.

Suppose that oral argument had been accorded to the Appellants herein. If the government had at oral argument conceded a burden of proof and persuasion on the question of venue, and had conceded the lack of facts establishing venue under the current state of the law, would that have affected the outcome? Is it plausible that one of the panel judges would have asked the government to set forth their facts and legal theory in support of the claim of venue against Stilley? If not, how can the panel claim that it has discharged its duty to give consideration to the appellant's arguments, consistent with the requirements of due process?

Theory switching on appeal violates due process. *Facet Enters. v. NLRB*, 907 F.2d 963 (10th Cir. 1990). This rule is one of fundamental fairness. Appellant is entitled under the rules to have the last word by way of reply. The government is thus duty bound to elect a theory as to the constitutional element of venue, and to set forth facts sufficient to sustain the conviction under that theory.

The government ELECTED not to commit to any venue theory respecting Stilley, while citing Callwood for the proposition that failure to brief by A LITIGANT constitutes forfeiture. Stilley was entitled to notice of the reasons, if any, that the government claimed that venue was established for purposes of this appeal. With this knowledge he could have made his statement on reply, demonstrating that the government's theory was flawed. Such notice would allow an effective opposition to the theory by way of reply.

Switching to a "silence" theory violates due process in and of itself. The government may at any time formally concede the lack of venue as to Stilley. It has no right, consistent with due process, to "lay behind the log" and hope (in this case successfully) that the panel will likewise refuse to address the issue. Therefore, neither the government nor the panel is at liberty to resurrect and rely upon any prior theory, to sustain the conviction, and most certainly not without giving Stilley the opportunity to respond to the theory de jour.

What if Stilley had adopted only the venue argument? Would the panel have rejected it without acknowledging the nature of the argument? The failure and refusal to address Stilley's venue argument undermines the fundamental fairness of the trial and contributes to a miscarriage of justice.

A "DEFRAUD CLAUSE" CHARGE IS NOT NECESSARILY A FELONY; THE PANEL BEGS THE QUESTION OF WHETHER THE UNDERLYING OFFENSE WAS A MISDEMEANOR OR FELONY, AND IN SO DOING CONCEDES THAT STILLEY COULD NOT POSSIBLY HAVE BEEN AWARE OF THE SPECIFIC PROVISION OF LAW THAT HE ALLEGEDLY VIOLATED; THUS THE PANEL DECISION CONFLICTS WITH US V. BRYAN.

The panel cited but one case in support of its contention that the conspiracy charge alleged a conspiracy to commit a felony, namely *United States v. Gallup*, 812 F.2d 1271, 1277 (10th Cir. 1987). This case was not cited by the government or by either appellant. Litigants are required to give notice of intent to argue cases not cited in the brief. Stilley assigns the panel's reliance on a single undisclosed decision, without the opportunity to be first heard, in writing or at oral argument, as a violation of his due process rights.

At page 1276 the Gallup Court made the following conclusions:

Gallup's first contention is anchored to the proposition that Count 1 of the indictment does not charge a substantive offense. This argument evidences a serious misunderstanding of the charge in Count 1 of the indictment. Gallup apparently does not accept the government's assertion that 18 U.S.C 371 is a substantive crime. ....

We do not agree with any of these contentions. It has long been accepted that 18 U.S.C. 371 defines a substantive crime.

The same opinion contains language suggesting that Gallup's count 1 was a conspiracy charge. At the bottom of the same page the court said:

Moreover, Gallup and Duke were indicted under count 1 for conspiracy to defraud the United States, not for conspiracy to induce or influence HUD pursuant to 18 USC 1012 [a misdemeanor statute]. The latter encompasses

count 2. The two offenses are completely separate and distinct.

The Gallup opinion is internally inconsistent in saying that count 1 alleged BOTH a substantive offense and a conspiracy charge. If true the indictment was multiplicitous and unlawful on that ground. If false the claim is an embarrassment to the 10th Circuit and should be corrected immediately.

By the very act of contrasting the misdemeanor STATUTE of a separate count of Gallup's indictment, and saying that Gallup's count 1 wasn't predicated upon the violation of that misdemeanor STATUTE, the Gallup court demonstrated a misunderstanding of the "defraud clause" of 371. By definition a conspiracy to violate a statute is not a conspiracy under the "defraud clause." The "defraud clause" is applicable only when there is no statute the violation of which was the object of the conspiracy. When the object of the conspiracy is the violation of a statute, THE UNDERLYING STATUTE DEFINES EITHER A FELONY OR A MISDEMEANOR, THUS SETTTLING THE QUESTION!

Even if we disregard all the above flaws, Gallup DOES NOT set forth a hard and fast rule, but rather presumes that the question of whether or not a "defraud clause" count is a felony must be decided on a case by case basis. This implicates US v. Dazey, 403 F.3d 1147 (10th Cir. 2005) which says that "proper attribution at sentencing requires...particularized findings about the scope of the agreement the individual defendant joined in relation to the conspiracy." Bryan v. United States, 524 US 184 (1998) says that "wilfullness" requires proof that the defendant was aware of the specific provision of law that he was charged with violating. This can't possibly be proven in a "defraud clause" charge under 18 USC 371.

Neither the District Court nor the panel made Dazey findings. There is no rational basis for concluding that the UNDERLYING common law crime OFFENSE contemplated by Count 1 was either 1) a felony, or 2) such that a citizen might possibly have knowledge of the specific provision of law allegedly violated. Use of the "defraud clause" IN A TAX CASE necessarily violates Bryan and Cheek, supra.

At the common law there were but 9 felonies, represented by acronym MR. & MRS. LAMB -- murder, robbery, manslaughter, rape, sodomy, larceny, arson, mayhem and burglary. Jerome v. US, 318 US 101, 87 L Ed 640, (1943) @ footnote 6. At 104 the opinion matter-of-factly states that "Since there is no common law offense against the United States [citations omitted], the administration of criminal justice under our federal system has rested with the states, EXCEPT AS CRIMINAL OFFENSES HAVE BEEN EXPLICITLY PRESCRIBED BY CONGRESS." (emphasis added) Footnote 6 begins by saying "It has frequently been held that when a federal statute uses a term which it does not define but which was a common law offense, it will be given its common law meaning."

If this maxim is used in this case, there can be no doubt that the a 371 "defraud clause" charge cannot be more than a misdemeanor. To hold otherwise is to hold that Congress 1) created an undefined common law crime, in itself a contradiction of terms, 2) prohibited a conspiracy to violate that new common law crime, and 3) made it a felony without expressly so stating, DESPITE THE FACT THAT SUCH APPELLATION IS CONTRARY TO LONG ESTABLISHED FEDERAL CASE LAW! Such is the epitome of legislative and judicial overreach, and an embarrassment to a society claiming any interest in liberty and justice.

Gallup raised more questions than it answered. This is a proper case for this court to 1) declare Stilley's "defraud clause" conviction under 371 a misdemeanor only, and 2) declare the 371 defraud clause illegal and unconstitutional as a violation of Jerome and other authorities.

THE PANEL OPINION CONCERNING THE APPLICATION OF THE  
PAPERWORK REDUCTION ACT TO STILLEY DEFIES LAW, THE WORDS OF IRS  
PRA NOTICES, AND COMMON SENSE.

The panel uses the plural possessive when it refers to the "defendants' obligation" to file a return. In the same paragraph the panel cites United States v. Stillhammer, 706 F.2d

1072, 1075 (10th Cir. 1983) for the proposition that use of a 1040 isn't necessarily the required form of return. In *US v. Patridge*, 507 F.3d 1092, 1094 (7th Cir. 2007), the court said words to the effect that a "return" need only contain information sufficient to calculate the tax.

Stilley could not have filed Springer's returns. That's impossible for any number of reasons. Stilley cannot forge Springer's signature, and Springer's tax information is protected by law from Stilley. Stilley could not get the tax information of his own clients without a power of attorney granting that power to Stilley. Of course Stilley had no such power of attorney from Springer.

If the panel's reliance on Stillhammer is right, a "return" was filed timely for the year 2005. Brian Shern and his team seized Springer's financial records in the spring of 2006, before April 15, 2006. That is enough information from which a tax could be assessed, if any was due. Furthermore, it is uncontested that Springer offered to supply the government with all his financial records, allow them to assess a tax, and then to pursue his remedies in court concerning whether or not the tax was due. Shern at James hearing, TR 157-197; see also p. 13-21 of Stilley reply brief.

Shern testified that he thought the offense was preventing the government from getting information about Springer's receipts. When this claim was thoroughly debunked (Id. @158) Shern switched his theory to contend that the defendants had concealed the "true nature" of the payments. Shern admitted that the defendants had a right to their own opinions of the character of the payments. Id. @ 159. Thereupon he switched back to the thoroughly discredited and (and previously abandoned!) argument that Stilley or Springer had concealed the existence of the payments. Id. @ 190. At 202 Shern admits Stilley's legal right to make claims and contentions concerning the character of transactions, and that mere error (which Stilley does not concede) is no crime.

Stilley doesn't have the exhibits, which would include copies of the instruction booklets, despite having caused a polite request for such to be made many months ago, to an officer of the IRS. Nevertheless, by the recollection of Stilley, the instructions inform a

reader that they must "file a tax return for any taxes for which you are liable" or words of similar import.

Stilley wasn't even arguably liable for Springer's taxes, assuming (without admitting) that taxes were due. The panel's refusal to concede the possibility that the PRA might possibly protect someone, somewhere, telegraphs a frantic anxiety and utter insecurity about the possibilities inherent in an honest consideration of the issues.

In 2004 the government committed a fraud upon the court with respect to Judy Patterson's 10th Circuit appeal, in order to get her to trade her PRA arguments, in her opening appeal brief, for immediate release. She flatly admitted that she hadn't provided any of the assistance as contemplated by Rule 35. Trial TR 820. Springer's petition outlines just part of the train of abuses, evasions, and usurpations that have been practiced for the purpose of ensuring that the rights enshrined in the PRA, by the US Congress, are never realized or possessed by the citizenry.

Stilley's claims are independent of Springer's claims. Whatever the PRA disclosures told Springer, they affirmatively told Stilley that he was NOT required to make a return of Springer's income. How then can this court sustain a conviction of Stilley? Does the mere act of believing a PRA notice constitute a basis for 15 years imprisonment? The credibility of the court requires rehearing and complete reversal, as to Stilley at least.

#### THE DELEGATION ARGUMENT OF FORD PREDATES LONSDALE AND CANNOT RATIONALLY SUPPORT THE PANEL'S DECISION.

The panel cites but one case, namely US v. Ford, 514 F.3d 1047, 1053 (10th Cir. 2008), in support of its theory that Congress need not delegate authority to anyone, in order to vest authority for the enforcement of federal tax laws.

Ford was a pro se litigant, apparently lacking any training in the law, who challenged a CIVIL summons on the grounds that the form of the summons, IRS Form 2039, was invalid, and also, apparently, (based upon statutory citations) a challenge based

upon the definition of various terms. NOTHING in Ford hints that he raised the argument at issue in this case, namely that CRIMINAL prosecution must be based upon the valid delegation of authority pursuant to statute promulgated by Congress.

Ford didn't address the issues in this case. Nor did the panel, in their unpublished per curiam. Clearly no one on the panel was willing to claim authorship. Thus the serious issues raised in the pleadings of Springer & Stilley remain unanswered in 10th Circuit case law.

This can only be the result of one thing. The panel could not put words on paper, with any semblance of logic, to answer the questions of WHO now has authority to do WHAT, with respect to either civil or criminal tax litigation, and yet sustain the conviction of STILLEY. (Springer speaks for himself, and eloquently enough.) Thus the panel denounces the arguments as "patently frivolous," declining to engage in any meaningful analysis.

Should we now believe that a janitor for the IRS has authority to commence a criminal prosecution? A contract janitor? Does an IRS rookie in New York City have authority to issue summons to Stilley in Arkansas? Is there any geographic limitation left on persons who CLAIM to have some authority to act on behalf of the IRS or on behalf of the Treasury? Is there an un-rebuttable presumption that any person who CLAIMS to work for the IRS has ACTUAL AUTHORITY to do ANY act respecting ANY IRS function (real or imagined) at ANY time and ANY place? Yet if this outrageous conclusion is to be doubted (and well it should be), by what means is a litigant expected to ascertain the boundaries of jurisdiction and authority of anyone, even the most blatant usurper? By what means may the citizen force the government to shoulder its burden of proving jurisdiction?

The panel itself admits that the law has changed subsequent to *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990). The panel opinion not only ignores this development altogether, it declares that regulations (to which Stilley has no access, with respect to times relevant to this prosecution) require the making of a return at "the local

Internal Revenue Service office that serves the legal residence...of the person required to make the return..."

Even if true (which Stilley does not concede) this legal conclusion exonerates and requires the reversal and dismissal of Stilley's conviction, for lack of venue. The government conceded as much in plain English under oath from the witness stand, by testimony of Shern. Trial TR 1848. However, the panel opinion states this legal conclusion, and then leaves the reader hanging concerning where the "local Internal Revenue Service office" is at, apparently lest it make the illegality of the continued detention of Stilley the more glaring and apparent.

THE PANEL DECISION IGNORES THE QUESTION OF JURISDICTION WITH  
RESPECT TO STILLEY; FEDERAL JURISDICTION OVER STILLEY IS  
CONSPICUOUS BY ITS ABSENCE.

Stilley has been sentenced to 15 years in prison for the failure to provide 1) information already admittedly in the hands of both the criminal investigator and various civil divisions of the IRS, 2) to an officer that doesn't exist, 3) of an office that has been abolished, 4) in violation of the laws, rules, and lawyer ethics provisions of both the states of Arkansas and Oklahoma, 5) with respect to matters clearly not within federal jurisdiction.

The 6th Circuit in US v. John Ford, 639 F.3d 718 (6th Cir. 4-14-11) reversed the conviction of John Ford "...because his non-disclosures were not matters of federal jurisdiction."

The panel didn't acknowledge the adoption of Stilley's motion for new trial or judgment as a matter of law, and brief. (NDOK Docket ## 261, 263) It did not acknowledge that Stilley's 12 page brief clearly complied with the technical requirements of the NDOK local CIVIL rule. It made no attempt to show why motion pages should be, or ever have been in any other case, treated as pages of the brief, added together, and

assigned as cause for striking a pleading. It made no attempt to show that the civil rule actually did or should apply to criminal cases. It is highly questionable that the panel actually read these arguments, as required by Stemm.

Stilley has been deprived of access to these pleadings by his adversary the US DOJ. However, the DOJ did not object to the incorporation of these pleadings into Stilley's adoption. Nor did the panel object despite a polite request that they do so, if they deemed same to be over-broad or burdensome. Stilley adoption p. 4; pages 2-3 (in Trulincs format) of original adoption 11-2-2010.

The fundamental essence of this claim is that Stilley was duty bound to PROMPTLY pay Turner's money, remaining in Stilley's IOLTA account, to the "person entitled" to the money AND to maintain confidentiality with respect to those transactions, except to the extent disclosure is specifically and unequivocally required by law. Stilley paid the money to the "person entitled," promptly upon notification of that fact, making no attempt whatsoever to circumvent routine third party information reporting. No one contends otherwise.

Distilled to the facts of this case, Ford requires the government to prove that a disclosure was required by law to be made by Stilley to a FEDERAL OFFICER OR ENTITY. There are no revenue districts or district directors to which a disclosure could have been made, by a third party such as Stilley. The government has not claimed any theory whereby Stilley would have been required to make such disclosures to these non-existent entities or officers, or to any other federal officer. The panel has not attempted to supply this deficiency.

Furthermore, the PRA notices say that a return is only required by a person liable for the tax. The government makes no claim whatsoever that Stilley is or ever was a person liable for any tax that Springer may have owed, (if any) at any time.

The Ford court also found support in Ford's claim of entitlement to the Rule of Lenity. Yet the 10th Circuit by its various actions has demonstrated that one who seeks judicial review of the contours of federal power will, 1) at worst, face suspension from the

practice of law as did Jerold Barringer, Springer's chosen counsel, or 2) at best face a stony silence and refusal to even acknowledge the nature of the legal questions presented, much less provide a fair adjudication of same. Actually, Stilley now stands disbarred from practice within the circuit, via the criminal conviction alone, while his legal arguments are ignored. When relying on the criminal conviction, as opposed to the patently unconstitutional Arkansas disbarment, the court was magnanimous, saying that Stilley might prevail - and thus assuming his right to be heard in a reasonable time and manner.

Under these circumstances, no licensed attorney who values his or her license will litigate these jurisdictional issues, no matter how tangential to the core issues the 10th Circuit wishes to avoid. Who can afford to be suspended or disbarred from the practice of their chosen profession? This leaves fundamental questions as to the scope of federal jurisdiction in hands of untrained and unlearned individuals such as Mr. Ford, proceeding pro se. Such litigants are easy marks for the evasive maneuvers of experienced jurists.

In addition to flouting fundamental jurisdictional and due process requirements, the panel order (apparently intentionally) chills the 1st Amendment right to petition the government for the redress of grievances.

The common thread in all the issues presented in this petition for rehearing - refusal to consider and adjudicated unassailable legal arguments favorable to a defendant - is demonstrated by the treatment of a certain lady named Skoshi Thedford Farr. In *United States v. Farr*, 536 F.3d 1174, (10th Cir 2008) Judge Friot is quoted as complaining about having to be "pulling the case out of the ditch for the government." Friot refused to rule on a motion for directed verdict, for the simple reason that Farr was uncontrovertibly entitled to it, if any ruling was made. However repugnant he deemed his dereliction of duty, he found it less repugnant than complying with judicial ethics and performing the sworn duties imposed by his oath of office. Judges Kelly, Holloway and Gorsuch affirmed, refusing to compel a ruling, or otherwise to give Farr the benefit of the process to which she was clearly due.

In *United States v. Farr*, 591 F.3d 1322 (10th Cir. Jan 11, 2010) judges Kelly, Siler,

and Tymkovich approved a retrial on grounds that no court had made a ruling synonymous with acquittal. The fact that Farr was clearly ENTITLED to a ruling didn't seem to matter.

Such behavior is positively corrosive to honest government, and the reputation and the bench and bar. No judge of this court has any moral, legal, or ethical right to participate in "pulling the case out of the ditch" for the government as against Stilley. Stilley respectfully requests that each judge in active service (or otherwise entitled to vote) cast their vote in favor of rehearing, ask for a count of the votes, file a written opinion favoring rehearing (and rehearing en banc) if necessary, and otherwise to perform every act reasonably within their power to ensure that Stilley is accorded full and fair consideration of every issue, at least to the extent necessary to provide complete relief.

#### CONCLUSION

For any and all of the foregoing reasons, rehearing or rehearing en banc should be granted. If complete relief is not granted without same, oral argument should be allowed. The convictions irreconcilably conflict with well established legal authorities and precedents. The convictions should be reversed and dismissed.

By: /s/ Oscar Stilley                      November 22, 2011  
Oscar Stilley #10579-062  
FCC Forrest City Low  
PO Box 9000  
Forrest City, AR 72336-9000

#### CERTIFICATE OF SERVICE

I Oscar Stilley certify by my signature above that I have caused this pleading to be served on the government by CM/ECF, a splendid piece of software to which Stilley no longer has direct access; and by mesne electronic transfers to Lindsey Springer, Appellant in a consolidated case, with all deliberate speed.

## ORDER AND JUDGMENT\*

\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32

Before LUCERO, BALDOCK, and TYMKOVICH, Circuit Judges.

A jury convicted Lindsey Kent Springer of one count of conspiring with Oscar Amos Stilley to defraud the United States, three counts of tax evasion, and two counts of willful failure to file a tax return. Mr. Stilley was convicted of one count of conspiracy and two counts of aiding and abetting Mr. Springer's tax evasion.

The district court sentenced both men to fifteen years in prison, three years of supervised release, and restitution for tax losses exceeding \$2 million. In appeal Nos. 10-5055 and 10-5057, Mr. Springer and Mr. Stilley (#226;#128;#156;defendants#226;#128;#157;) respectively challenge their convictions and sentences. In appeal Nos. 10-5156 and 11-5053, Mr. Springer challenges two post-conviction proceedings. n.1 For the reasons discussed below, we affirm. n.2

n.1 Appeal Nos. 10-5055 and 10-5057 share one record; Appeal Nos. 10-5056 and 11-5053 were submitted with their own records. All record-citations correspond to the particular appeal(s) under discussion.

n.2 During the pendency of these appeals, Mr. Springer's attorney,

Jerold W. Barringer, was indefinitely suspended from practicing before this court. See *In re Barringer*, No. 11-816 (10th Cir. Sept. 2, 2011), reh'g en banc denied, (10th Cir. Sept. 28, 2011). Mr. Springer is presently subject to pro se filing restrictions, but those restrictions are inapplicable to criminal appeals. See *Springer v. IRS ex rel. United States*, 231 F. App'x 793, 802-04 (10th Cir. 2007) (unpublished).

## I

The facts adduced at trial established that Mr. Springer's trouble with the Internal Revenue Service (IRS) began in the 1980s, with a dispute over payroll taxes. *R.*, Vol. 3 (Tr. Vol. 11) at 3093. Since then, he has maintained a course of conduct to avoid paying taxes.

In the early 1990s, Mr. Springer founded Bondage Breakers Ministries, which aimed to get rid of the IRS; *id.* at 3114. He also began touring the country, offering legal and tax advice to individuals embroiled in tax disputes, and accepting in return sometimes hundreds of thousands of dollars. In this capacity, Mr. Springer initiated maybe a thousand lawsuits, *id.* (Tr. Vol. 12) at 3284, many against the government and employees of the government. He eventually met Mr. Stilley, who is now a disbarred lawyer, and together they devised a scheme to channel Mr. Springer's unreported income through Mr. Stilley's client trust account. Mr. Springer also used his ministry as a front for accepting money, despite being the subject of IRS collection-actions for unpaid income taxes dating back to 1990, and an IRS civil investigation for promoting abusive tax shelters.

By 2005, Mr. Springer had gained the full attention of the IRS. On June 3, 2005, the IRS referred Mr. Springer to the Justice Department to investigate potential criminal tax

violations. On September 16 of that year, the government executed a search warrant of Mr. Springer's residence. And, on February 2, 2006, Mr. Stilley was served with a grand jury subpoena. During the course of the investigation, defendants denied receiving any income for their advice, representing instead that people simply made donations to Mr. Springer's ministry, with no expectation of services in return. But at trial, the government refuted those statements, offering testimony from numerous witnesses who had paid large sums of money to defendants in exchange for their supposed tax and legal expertise. Based on this and other evidence, the jury convicted defendants on all counts.

Defendants have now lodged these appeals.

## II

Nos. 10-5055 and 10-5057

Defendants' opening brief n.3 can be distilled to advance the following eight arguments: 1) defendants committed no crimes because there is no government entity outside of Washington, D.C. with the lawfully delegated power to collect taxes or enforce the internal revenue laws; 2) the Paperwork Reduction Act precludes imposition of all penalties arising from their convictions; 3) the district court erred in denying their motion to suppress; 4) the district court erroneously instructed the jury as to the definitions of gift and income; 5) the district court should have allowed defendants to subpoena employees of the Justice Department and the IRS; 6) defendants did not waive their right to counsel voluntarily, knowingly, and intelligently; 7) the district court did not properly calculate their attributable tax losses under the sentencing guidelines or properly apply their respective sentencing enhancements; and 8) Mr. Stilley's conspiracy conviction cannot be classified as a felony. n.4

n.3 Mr. Stillely has joined Mr. Springer's brief, but at times advances his own arguments. We refer to the briefs jointly as defendants' brief; or Aplt. Revised Opening Br.; and specify when we address Mr. Stillely's independent contentions.

n.4 Defendants make passing references to other potential issues throughout their opening brief, but such scattered, perfunctory statements are insufficient to invoke appellate review and, accordingly, those issues are deemed waived. See, e.g., *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004).

We address each argument in turn.

#### A. Delegation of IRS Collection and Enforcement Authority

Defendants first contend they committed no crimes because no government entity exists outside of Washington, D.C. with the lawfully delegated authority to collect taxes or enforce federal tax laws. As we understand their argument, defendants believe the Secretary of the Treasury is authorized to collect taxes only within the territorial limits of Washington, D.C. See Aplt. Revised Opening Br. at 10 (citing 4 U.S.C. § 72 (All offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law.)). To accommodate this geographic restriction, defendants contend, Congress granted the President, pursuant to

26 U.S.C. § 7621, the power to establish internal revenue districts, headed by district directors, to exercise the Treasury Secretary's authority beyond Washington. See Aplt. Revised Opening Br. at 8-9. However, Congress passed the Internal

Revenue Service Restructuring and Reform Act of 1998 (#226;#128;#156;RRA#226;#128;#157;), Pub. L. 105-206, 112 Stat. 685, which, among other things, abolished internal revenue districts and district directors. See Aplt. Revised Opening Br. at 11 (citing the RRA and asserting that #226;#128;#156;[w]ithout [internal revenue districts and district directors] there could never have been any proper delegation of authority outside the District of Columbia from the [Treasury] Secretary to any U.S. Attorney.#226;#128;#157;). Consequently, defendants claim, there is no legally authorized entity to collect taxes or enforce the tax laws, and no criminal offense stemming from their failure to pay taxes. See id. (#226;#128;#156;Without [internal revenue districts and district directors] the indictment failed to allege an offense in all Six Counts because no law required Springer to deliver any Form 1040 . . . to any place required by law.#226;#128;#157; (internal quotation marks omitted)).

These types of spurious delegation arguments were rejected as frivolous before the RRA was enacted, see, e.g., *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir. 1990), and they have been rejected as frivolous since, see, e.g., *United States v. Ford*, 514 F.3d 1047, 1053 (10th Cir. 2008). The Secretary of the Treasury is authorized under 26 U.S.C. #194;#167; 6091(a) to promulgate regulations prescribing #226;#128;#156;the place for the filing of any return, declaration, statement or other document.#226;#128;#157; Internal revenue districts are #226;#128;#156;now defunct,#226;#128;#157; *Allnutt v. Comm#226;#128;#153;r*, 523 F.3d 406, 408 n.1 (4th Cir. 2008), but 26 C.F.R. #194;#167; 1.6091-2(a) requires individuals to file returns with #226;#128;#156;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.#226;#128;#157; Otherwise, if so instructed, individuals or corporations must file returns with a specifically designated internal revenue service center. Id. #194;#167; 1.6091-2(c).

In short, defendants#226;#128;#153; delegation argument is patently frivolous.

## B. Paperwork Reduction Act

Defendants next contend they were not subject to any penalties because IRS Form 1040 fails to comply with the Paperwork Reduction Act, 44 U.S.C. § 3501, et seq. (PRA). In particular, they cite § 3512(a), which states: [N]o person shall be subject to any penalty for failing to comply with a collection of information . . . if . . . (1) the collection of information does not display a valid control number . . . ; or (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number. According to defendants, they cannot be penalized for their crimes because IRS Form 1040 does not comply with § 3512(a).

Initially, defendants make no showing that IRS Form 1040 fails to comply with § 3512(a). And, we rejected a similar argument in one of Mr. Springer's prior appeals. See *Springer v. Comm'r*, 580 F.3d 1142, 1144-46 (10th Cir. 2009). In that case, he contested certain failure-to-pay penalties on the ground that Form 1040 violated the PRA, but we recognized that Form 1040 did not give rise to the penalties because they had an independent and separate statutory basis under the Internal Revenue Code . . . that [was] not based on Mr. Springer's failure to file Form 1040s. *Id.* at 1145. Likewise, here, defendants' obligation to file a return, and the crimes associated with their efforts to circumvent that obligation, are prescribed by statute, e.g., 26 U.S.C. § 6012 (requiring the filing of return), 7203 (proscribing the failure to file return); 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) (explaining that the obligation to file a tax return and the criminalization of willful failure to do so represent

statutory mandates divorced from Form 1040); see also *United States v. Dawes*, 951 F.2d 1189, 1192 (10th Cir. 1991) (affirming convictions for willful failure to file returns on other grounds but noting that “[w]e would be inclined to . . . hold that the operation of the PRA in these circumstances did not repeal the criminal sanctions for failing to file an income tax return because the obligation to file is a statutory one”). In fact, an actual Form 1040 may not even be necessary to comply with the statutory obligations. See *United States v. Stillhammer*, 706 F.2d 1072, 1075 (10th Cir. 1983).

Defendants might have invoked the PRA to avoid any penalties assessed for submitting faulty information on a non-compliant IRS form, but they cannot use the PRA to side-step criminal offenses arising under the Internal Revenue Code.

### C. Motion to Suppress

Defendants also assert the district court should have suppressed evidence obtained after their case was referred to the Department of Justice for criminal investigation. In analyzing the legal aspects of this issue *de novo*, we view the evidence in the light most favorable to the government. *United States v. White*, 584 F.3d 935, 944 (10th Cir. 2009). Defendants’ contention is rooted in *United States v. LaSalle National Bank*, 437 U.S. 298, 311-13, 318 (1978), where the Supreme Court restricted the IRS from using civil summonses either solely to further criminal investigations or to investigate any case once it has been referred to the Justice Department for criminal prosecution. Defendants contend *LaSalle* required the court to suppress evidence obtained with a civil summons issued in 2004 because at that time the government was pursuing possible criminal charges.

The problem with this argument is that during most of 2004, the IRS was conducting a civil investigation into Mr. Springer’s promotion of abusive tax shelters, and it did not refer him to the Justice Department for possible criminal violations until June

3, 2005; Mr. Stilley was not referred until January 6, 2007. There was, therefore, no need to suppress evidence obtained before these dates, even if the civil investigation led to possible criminal consequences. See *id.* at 309 (“It is now undisputed that a special agent is authorized . . . to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences; (quotation omitted)). That defendants were implicated in an expanding criminal investigation in a related case is irrelevant to the validity of the summons, since there had not yet been a referral to the Department of Justice. See 26 U.S.C. § 7602(d)(2)(A)(i) (“A Justice Department referral is in effect with respect to any person if--the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws[.]”).

#### D. Jury Instructions

Next, defendants contend the district court improperly instructed the jury on the meaning of “gift” and “income.” We review *de novo* whether the court properly instructed the jury. *United States v. Urbano*, 563 F.3d 1150, 1154 (10th Cir. 2009). The Internal Revenue Code defines “gross income” as “all income from whatever source derived;” 26 U.S.C. § 61. “Gifts” are excluded from gross income, see *id.* § 102, although the question of whether a particular transfer is a “gift” depends on the facts of the case, turning primarily on the transferor’s intent, see *Comm’r v. Duberstein*, 363 U.S. 278, 285-86, 289-90 (1960); *United States v. Kasynski*, 284 F.2d 143, 145 (10th Cir. 1960).

Here, the court explained to the jury that the determinative inquiry is intent:

The intent of the person transferring the money is important in determining whether the amount received . . . is a gift for income tax purposes. R., Vol. 3 (Tr. Vol. 12) at 3400. The court emphasized that [w]here the person transferring the money did not act from any sense of generosity but rather to secure goods, services, or some other such benefit for himself or another, there is no gift. Id. The court then reminded the jury that it should take into account all the facts and circumstances of [the] case, id. at 3401, and, ultimately, gave the jury the task of determining whether any transfers were gifts or income, id. at 3399. We perceive no error in these instructions.

Still, defendants assert the district court erred because the term gift is not defined by the Internal Revenue Code. But the absence of a statutory definition does not, in and of itself, indicate error. Defendants also contend that the court erroneously instructed the jury on the term taxable income, rather than gross income. If defendants mean to suggest that while gross income excludes gifts, taxable income does not, they are wrong. Taxable income is defined as gross income less any permissible deductions, including gifts. See 26 U.S.C. § 63. Therefore, because gifts are excluded from the definitions of both terms, the court was correct to instruct the jury that taxable income does not include money or property acquired by gift. R., Vol. 3 (Tr. Vol. 12) at 3399.

#### E. Subpoena of Federal Employees

Defendants argue that their Sixth Amendment rights were violated because they were unable to subpoena employees of the Justice Department and the IRS. In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 463 n.1, 468 (1951), the Supreme Court upheld the validity of a Justice Department regulation prohibiting an employee of the Department from

responding to a subpoena duces tecum without prior approval from the Attorney General. We applied *Touhy* in *United States v. Allen*, 554 F.2d 398, 406 (10th Cir. 1977), where we upheld the validity of a regulation requiring the person seeking evidence to submit an affidavit or statement summarizing the testimony desired so that the Department could consider the [subpoena] request and determine whether to grant permission for the testimony.

Here, defendants advance no argument why *Touhy* should not bar their subpoena requests. Nor do defendants indicate whether they submitted to the Department of Justice a summary of the evidence they sought to obtain, as required by 28 C.F.R. 16.23(c). And, as the government points out, the IRS maintains similar regulations for its employees, see 26 C.F.R. 301.9000-4, but defendants made no attempt to comply with those provisions either. Under these circumstances, we have little difficulty concluding that defendants fail to show their rights were violated.

#### F. Waiver of Right to Counsel

Defendants also raise a Sixth Amendment issue concerning their waiver of counsel, which they say was not done knowingly, intelligently, or voluntarily.

It is unclear to what extent Mr. Stilley joins Mr. Springer in this argument. He says he adopts Mr. Springer's argument that he was not properly warned of the dangers of proceeding pro se, but he does not rely on Mr. Springer's reasoning. See *Adoption of Arguments in Springer Brief*, at 14. To the extent that Mr. Stilley joins Mr. Springer's brief, we consider their consolidated arguments herein. To the extent Mr. Stilley reserves further argument, his failure to advance those arguments constitutes waiver.

See *Faretta v. California*, 422 U.S. 806, 835 (1975). #226;#128;#156;[A] defendant may waive the right to counsel and proceed at trial pro se only if the waiver is knowing, intelligent, and voluntary.#226;#128;#157; *United States v. DeShazer*, 554 F.3d 1281, 1288 (10th Cir. 2009) (internal quotation marks omitted). We review this issue de novo. *United States v. Silkwood*, 893 F.2d 245, 248 (10th Cir. 1989). A waiver is voluntary if the defendant was given a clear, alternative choice to the waiver. See *United States v. Burson*, 952 F.2d 1196, 1199 (10th Cir. 1991). To ensure a waiver is made knowingly and intelligently, a trial judge ideally should conduct a #226;#128;#156;thorough and comprehensive formal inquiry including topics such as the nature of the charges, the range of punishment, possible defenses, and a disclosure of risks involved in representing oneself pro se.#226;#128;#157; *United States v. Turner*, 287 F.3d 980, 983 (10th Cir. 2002) (internal quotation marks and italics omitted).

Here, defendants#226;#128;#153; waiver was voluntary because the district court alerted them to their clear alternatives to self-representation. See R., Vol. 3 (April 22, 2009 Mot. Hrg.) at 71 (informing defendants that #226;#128;#156;both of you must understand that you do have a right to a lawyer#226;#128;#157; and #226;#128;#156;[b]oth of you have standby counsel#226;#128;#157;). The waiver also was knowing and intelligent because defendants were twice explained the advantages of being represented by an attorney and the dangers and disadvantages of proceeding pro se, see *Faretta*, 422 U.S. at 835, yet they insisted on relinquishing their right to counsel and forgoing the benefits attendant to that right. Indeed, the court asked defendants a multitude of questions to evaluate their understanding of the nature of the charges against them, the dangers and disadvantages of proceeding pro se, and the consequences of a conviction. See R., Vol. 3 (April 22, 2009 Mot. Hrg.) at 82-92. Defendants signaled their understanding and were steadfast in their intent to represent themselves. Defendants now contend they were confused at the time, but the record makes clear they knew what they were doing and made their choice

with eyes open, Faretta, 422 U.S. at 835 (internal quotation marks omitted). We are satisfied that defendants waived their right to counsel knowingly, voluntarily, and intelligently.

## G. Sentencing

Next, defendants contend the district court erred in applying the sentencing guidelines and the relevant sentencing enhancements. n.6

n.6 Once again, it is unclear to what extent, if any, Mr. Stilley adopts Mr. Springer's arguments. Rather than assume a wholesale waiver, we afford Mr. Stilley's pro se appellate materials a liberal construction, as we must, and assume he joins Mr. Springer's contentions to the extent applicable to him.

We review criminal sentences for reasonableness, evaluating both procedural and substantive components. *United States v. Martinez*, 610 F.3d 1216, 1223 (10th Cir.), cert. denied, 131 S. Ct. 543 (2010). Procedural review asks whether the sentencing court committed any error in calculating or explaining the sentence. Substantive review involves whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a); *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1214-15 (10th Cir. 2008) (internal citations and quotations omitted). We review legal questions de novo and the substantive reasonableness of the sentence for an abuse of discretion. See *id.* at 1215.

### 1. Tax Loss Calculation

As best we can tell, defendants initially challenge the district court's tax loss calculation. We may overturn the district court's tax-loss calculation only if it was clearly erroneous; *United States v. Hoskins*, 654 F.3d 1086, 1092 (10th Cir. 2011). The guidelines state that [i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income . . . less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made; USSG § 2T1.1(c)(2) n.(A). Given the absence of a more accurate assessment of defendants' tax losses, the court multiplied each defendant's income for the relevant tax years by 20%. The court then added to each defendant's tax loss the loss attributable to the other defendant during the conspiracy, because the scheme constituted jointly undertaken criminal activity; USSG § 1B1.3(a)(1)(B). The court also added to Mr. Springer's tax loss his assessments stemming from tax years 1990 through 1995, as well as the tax loss attributable to one of his clients whom he helped try to avoid paying taxes. The court followed the same approach with Mr. Stilley for his involvement with this client, as well as two other individuals he advised. Lastly, the court added each defendant's state tax losses to ascertain their respective aggregate tax losses.

Mr. Springer contests the inclusion of his assessments from 1990 through 1995, although he does not explain why. n.7

n.7 Mr. Springer makes a cryptic, almost incomprehensible reference to records showing that the Secretary had released 1990 through 1995 as extinguished . . . ; Aplt. Revised Opening Br. at 47. If Mr. Springer is alluding to lien releases that were accidentally issued by the IRS but subsequently revoked, this argument was raised and rejected in a prior appeal. See *United States v. Springer*, 427 F. App'x 650, 652 (10th Cir. 2011).

Additionally, citing *United States v. Meek*, 998 F.2d 776 (10th Cir. 1993), defendants argue the court should not have considered conduct outside the years in the indictment; Aplt. Revised Opening Br. at 47. Meek undermines their contention, however, because in that case, we approved the district court's consideration of non-charged relevant conduct to calculate the total tax loss attributable to the defendant. 998 F.2d at 782; see also USSG #194;#167; 2T1.1 cmt. n.2 (#128;#156;In determining the total tax loss attributable to the offense (see #194;#167; 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.#128;#157;). And defendants point to no evidence demonstrating that the conduct considered by the district court was unrelated for purposes of assessing the tax loss. Instead, they make bald allegations that were clearly rejected by the jury.

We perceive no error in the district court's tax loss calculation.

## 2. Sentence Enhancements

Defendants also challenge their sentence enhancements, beginning with a two-level increase under USSG #194;#167; 2T1.1(b)(1) for failing to report or identify criminal-source income exceeding \$10,000. The record clearly supports the district court's finding, however, that defendants committed wire fraud by convincing a client to transfer \$250,000 into Mr. Stilley's client trust account, not only to hide the money from the government, but also to defraud their client. The record also supports the court's application of the enhancement based on #128;#156;defendants' joint representation of [another client, which] was, from its inception, an exercise in fraud and obtaining money under false

pretenses, #226;#128;#157; R., Vol. 3 (Sent. Tr. Vol. 3) at 3999.

Defendants next object to a two-level enhancement pursuant to USSG #194;#167; 2T1.1(b)(2) for employing sophisticated means to commit their offenses. But again, the record supports the district court#226;#128;#153;s finding that Mr. Stilley used his highly-regulated client trust account as #226;#128;#156;an instrument of fraud,#226;#128;#157; R., Vol. 3 (Sent. Tr. Vol. 3) at 4001. Additionally, Mr. Springer used his purported ministry to solicit funds that he reported as donations, and he used a check-cashing service to avoid maintaining a checking account with reachable assets. And, of course, underlying all this was defendants#226;#128;#153; scheme of fraudulently advising individuals how to violate the tax code. Based on this evidence, we are satisfied that defendants#226;#128;#153; conduct warranted the enhancement. See USSG #194;#167; 2T1.1 cmt. n.4 (#226;#128;#156;Conduct such as hiding assets or transactions, or both, through the use of fictitious entities . . . ordinarily indicates sophisticated means.#226;#128;#157;); cf. *United States v. Ambort*, 405 F.3d 1109, 1120 (10th Cir. 2005) (affirming enhancement where defendant conducted tax seminars to teach ways of delaying discovery of tax offenses).

Relying on other arguments we rejected above, defendants also contest the application of USSG #194;#167; 2T1.9(b)(2) for encouraging others to violate the tax code. Yet the record is replete with evidence sustaining the court#226;#128;#153;s application of the enhancement, and defendants#226;#128;#153; unsupported contention otherwise is meritless.

To the extent defendants challenge the court#226;#128;#153;s application of USSG #194;#167; 3C1.1 for obstructing justice (or any other remaining enhancement, for that matter), their arguments advance no reasoned argument and are insufficient to invoke appellate review.

## H. Conspiracy as a Felony Offense

Finally, Mr. Stillely contends his conspiracy conviction under 18 U.S.C. § 167; 371 should be a misdemeanor because his underlying substantive offense is a misdemeanor. The conspiracy statute says that one who conspires to defraud the United States may be punished up to five years in prison, unless the object of the conspiracy is a misdemeanor, in which case the punishment for the conspiracy shall not exceed the punishment for the misdemeanor. *Id.* Mr. Stillely's felony conviction for conspiring to defraud the United States was an independent crime punishable by up to five years in prison. See *United States v. Gallup*, 812 F.2d 1271, 1277 (10th Cir. 1987). There is thus no merit to his claim that the conviction should be classified as a misdemeanor.

No. 10-5156

In appeal number 10-5156, Mr. Springer challenges the district court's denial of his petition for a writ of error coram nobis, in which he claimed his waiver of counsel was not knowing, voluntary, and intelligent. We previously denied Mr. Springer's petition for a writ of mandamus or coram nobis seeking relief on the same grounds. See *United States v. Springer*, No. 10-5101 (10th Cir. Oct. 22, 2010). That decision constitutes the law of the case and bars Mr. Springer's contentions raised in appeal No. 10-5156. See *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1294 (10th Cir. 2010). The issue is meritless in any event because Mr. Springer is confined on the conviction he attempted to challenge by way of his petition, but he has not shown that relief under 28 U.S.C. § 167; 2255 is unavailable or inadequate. See *United States v. Payne*, 644 F.3d 1111, 1112-13 & n.2 (10th Cir. 2011) (holding that an inmate is not entitled to coram nobis relief unless relief under 28 U.S.C. § 167; 2255 is unavailable or would be inadequate). And, lest there be any lingering doubt whether Mr. Springer could avail himself of coram nobis

relief, the foregoing merits discussion demonstrates that he is not entitled to this extraordinary remedy; Klein v. United States, 880 F.2d 250, 253 (10th Cir. 1989) (quotation omitted).

No. 11-5053

After he was convicted, Mr. Springer moved for a new trial and evidentiary hearing based on what he claimed was newly discovered evidence supporting his motion to suppress. The district court denied the motions because Mr. Springer failed to satisfy the five-part test necessary for a new trial. See *United States v. Quintanilla*, 193 F.3d 1139, 1147 (10th Cir. 1999) (setting forth five-part test to ascertain whether newly discovered evidence warrants a new trial). The court explained that, among other things, the motions were predicated on evidence available before trial; they were premised on a previously rejected, non-evidentiary contention that the RRA prevented the IRS from enforcing the revenue laws outside of Washington, D.C.; and they suggested no possibility of acquittal. Mr. Springer now challenges those rulings, advancing a host of irrelevant or unintelligible arguments in support of the suppression issue. We affirm the denial of these motions for substantially the same reasons articulated by the district court in its order dated March 17, 2011.

### III

In appeal Nos. 10-5055 and 10-5057, Mr. Springer and Mr. Stilleys respective convictions and sentences are AFFIRMED. Mr. Springer's motion to unseal documents sealed in the district court is DENIED. In appeal No. 10-5056, the denial of Mr. Springer's petition for a writ of error coram nobis is AFFIRMED.

In appeal No. 11-5053, the judgment of the district court is AFFIRMED for

substantially the same reasons as stated in the district court#226;#128;#153;s order dated March 17, 2011. To the extent defendants raise other issues that we have not explicitly discussed, we have considered them and find them to be meritless. Accordingly, any other outstanding requests for relief are DENIED.

Entered for the Court

PER CURIAM

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

United States of America,	)	
	)	
Appellee,	)	Case No. 10-5057, 10-5055
vs.	)	
	)	(D.C. No. 4:09-cr-00043-SPF-2)
Oscar Amos Stilley,	)	
	)	
Appellant	)	

---

**MOTION FOR ORDER STATING THAT STILLEY WILL BE PERMITTED TO BRIEF THE COURT AFTER HIS CLAIMS OF A RIGHT OF ACCESS TO THE COURTS ARE LITIGATED AND FINALLY DECIDED**

Comes now Oscar Stilley (Stilley) and for his motion states:

A panel of this Court has apparently cut off Stilley's right to file his own brief after litigating his right of reasonable access to the courts. It appears from the unsigned, unpublished per curiam decision that a mandate will issue as to both defendants, absent further order of the court.

This Court repeatedly refused to intervene to prevent the interference with Stilley's rights of access to the Courts. The 10th Circuit entered a show cause order (10-812) requiring Stilley to show cause why he should not be disbarred as a result of his conviction. The order of disbarment was entered on June 21, 2010.

Stilley objected on grounds that the US Department of Justice-Federal Bureau of Prisons (DOJ-BOP), a subdivision of Stilley's adversary the US Department of Justice, was actively interfering with Stilley's possession and use of his own property to protect his legal rights. A panel of this court consisting of Briscoe, Kelly, and Tymkovich entered an order

on September 8, 2010, upholding the suspension. The panel explained that "...Mr. Stilley's arguments miss the point. He was disbarred...because he was found guilty of serious crimes. .... Mr. Stilley may ultimately obtain appellate relief. Accordingly, if his convictions are at some point overturned on appeal or by the United States Supreme Court, he may petition this court for reinstatement."

In the instant criminal appeal, (10-5057) Stilley has repeatedly sought judicial relief from the malicious interference of his adversaries the DOJ-BOP, in Stilley's attempts to use his own property to litigate this case as well as other legal matters. On 5-25-2010 Stilley (then housed in the Tulsa County Jail) moved this Court for an order requiring the government to permit access to sufficient resources to permit appellant to effectively appeal. Judges Henry and Tymkovich denied the motion 6-1-2010 without acknowledging specifically the existence of the motion.

On 8-2-2010, Stilley filed a motion to prohibit the DOJ-BOP from active interference with the use of Stilley's own resources in the preparation of his brief in the instant appeal. Judges Tacha and Tymkovich denied this motion 8-10-2010, before the government responded, on the grounds that Stilley must first seek administrative remedies through the DOJ-BOP.

On 9-8-2010, Stilley filed a "Motion for Stay of Briefing Pending the Outcome of a Request for Administrative Relief..." The time for filing the brief was extended to 12-6-2010. The order, by Kelly and Gorsuch, stated that "no further extensions of time will be granted."

On 12-9-2010, Stilley filed a "Motion for Judicial Determination of How Stilley May Avail Himself of the Process to Which This Court Has Declared he is Entitled; Claim of Right to Access the Courts;...." On 12-14-2010, Judges Kelly and Gorsuch ordered the government to respond. The response was filed 12-22-2010. The Court entered its order on 12-27-2010. Stilley filed a motion to reconsider on 1-18-2011.

On 2-3-2010, Judges Kelly and Gorsuch reconsidered the 12-27-2010 order, but declined to grant any further relief. In the order the Court said:

J... Appellant's "Adoption of Arguments in Springer's Brief, and Re-Affirmation of Previous Adoptions" will be filed and the court will issue a briefing schedule allowing appellant 40 days in which to file a supplemental brief, not to exceed 7000 words or 20 pages, addressing only issues that are not addressed in Mr. Springer's opening brief. (Appellant is advised that, in filing his pro se supplemental brief, he will be limited to the research materials available at his place of confinement, as is any other pro se inmate litigant.) No extensions of time will be granted.

On 2-10-2011, Stilley filed a document entitled "Advice to the Court Respecting Appointed Counsel and Briefing." Stilley declined appointed counsel under the terms stated. Whereas the appointed lawyer was offered a 14,000 word brief, Stilley was limited to a 7,000 word brief. Stilley objected that the truncation of his brief rights. Stilley expressly reserved his right to file a full 14,000 word brief after fully litigating his claim of right of access to the courts. Stilley stated plainly that a schedule for Stilley to file a 7,000 word brief under these terms and conditions, while Stilley had no access to the record and other essentials, would be a waste of time. The clerk thereupon issued an order fixing 3-21-2011 as the deadline for the government to file a consolidated response brief.

Additional actions of certain judges of this court, bearing upon the merits of this request, are omitted for space reasons and also because they are cumulative to the fact patterns set forth above. Stilley has shown a thorough intention to show his entitlement to reversal of his conviction and also to the restoration of his license to practice in the 10th Circuit, NDOK, and other jurisdictions.

The actions set forth above violate the maxim of *US v. Stemm*, 835 F. 2d 732 (CA10 1987) holding that litigants have the right to expect that the court will precisely follow its own rules in every case before it.

*Ex Parte Hull*, 312 US 546 (1941), *Johnson v. Avery*, 393 US 483 (1969), *Procunier v. Martinez*, 416 US 396 (1974) their progeny, and other cases, all prohibit the government from interfering with the right of a prisoner to use his or her own resources to prepare and file legal pleadings, or otherwise to obtain access to the courts. *Procunier v. Martinez* in particular makes it clear that this right is not defeated because the prisoner may be provided

a law library, or offered a lawyer at public expense.

Stilley IS NOT raising any right, constitutional or otherwise, to force the government to provide Stilley with goods or services with which to access the courts, even though he has offered to accept such as an alternative, solely as an accommodation to the BOP, if requested. Stilley is objecting to active, invidious interference with the use of his own legal resources necessary and proper for the prosecution of his criminal appeal and other legal matters.

There can be no doubt that the government has actively interfered with Stilley's right to access to the courts. Stilley possesses a complete set of the docket items below, Ibico bound and tabbed, up to the date of the sentencing hearing. This material was sent by mail to Stilley, from Stilley's wife. The DOJ-BOP seized these documents and returned them to Stilley's home in Fort Smith, Arkansas.

Stilley has not seen the indictment, or the jury instructions, or for that matter virtually any pleading other than pleadings filed since his incarceration. Is it standard practice for the DOJ-BOP to deny a criminal defendant access to the pleadings in his own case, while an appeal is pending? Is this what Judges Kelly and Gorsuch meant when they said "as is any other pro se litigant?" Is this how all pro se litigants in BOP custody are treated?

At every level, Stilley's administrative claim will be decided by the employees of his legal adversary the DOJ and its subsidiary the BOP. This violates *Yamaha v. Riney*, 21 F.3d 793 (8th Cir. 1993) which requires a disinterested arbiter for legal disputes including those denominated as administrative. [Stilley is incarcerated within the territorial confines of the 8th Circuit.]

Judges Tacha and Tymkovich relegated Stilley to DOJ-BOP administrative remedies on 8-10-2010. In the interim the DOJ-BOP has stalled and stonewalled Stilley's efforts to get a decision that amounts to "keys to the courthouse," such that Stilley still is not ready to appeal to the courts. Yet now the panel [including Tymkovich] has cut off the right of appeal, before the exhaustion of administrative remedies and conclusion of the inevitable court litigation to follow.

Consider the following short, incomplete list of the materials that the government has obstructed Stilley from accessing:

- 1) Stilley's own Lexis-Nexis subscription;
- 2) The docket items and exhibits in this criminal case;
- 3) The state laws, attorney ethical rules and decisions, and judicial ethical rules and decisions, which are indispensable to various appellate issues;
- 4) The IRS regulations for time periods relevant to the indictment, without which certain legal claims are simply impossible to adequately brief.

The fundamental essence of due process is the right to be heard in a reasonable time and a reasonable manner. Forcing Stilley to litigate without even having access to the district court record - which the government possesses, and this court is by its own rules required to examine - cannot possibly comport with this legal principle. Such a theory allows everyone except the defendant/appellant, (in this case Stilley) who bears the burden of going forward with the appeal, to have complete and unfettered access to the record. Such process makes a mockery of the constitutional right to "due process."

The government cites the Federal Register, to which Stilley has no access whatsoever, along with federal regulations. The Court also cites to current federal regulations, yet denies Stilley the ability to show what the regulations were at the times relevant to this litigation. The regulations IN EFFECT AT THE TIME OF THE ALLEGED OFFENSE, (including some cited by neither the government nor the court) are linchpins in Stilley's defense with respect not only to the "delegated authority" and PRA arguments, but also with respect to other defenses.

Both the Federal Register and federal regulations fall into the category of "seemingly authoritative" citations, to which the US Supreme Court refers in *US v. Bounds*, 430 US 817, 826 (1977). The *Bounds* Court recognized the unfairness of allowing a powerful party such as the US DOJ to cite such "seemingly authoritative" authorities, while their adversaries lack the access necessary for an effective rebuttal and response. The *Bounds* Court declined the invitation to reverse its prior decisions, which held that a criminal

defendant (at the very minimum) cannot be denied access to the very laws and authorities upon which the government relies, in support of its claims respecting the lawfulness of an inmate's criminal conviction and imprisonment.

If Stilley is to be denied the right to brief the court AFTER the litigation of the questions concerning the right of access to the courts, please answer this question. Why did judges Tacha and Tymkovich direct Stilley to avail himself of the administrative process, as a condition precedent to litigating the issue in the courts? If Stilley will not be permitted to file his own appellate brief after the administrative process PLUS litigation of that issue in the courts of the Eastern District of Arkansas, where Stilley is incarcerated, why would Stilley be relegated to the administrative process?

If despite all these facts and analysis, neither the panel nor the full court is willing to grant the relief sought by this motion, please explain. Is there any process to which Stilley might avail himself on this issue, short of a petition to the US Supreme Court for writ of mandamus? If none is identified, Stilley will presume that none exists.

WHEREFORE, Stilley respectfully requests an order commanding the clerk of court to withhold the issuance of a mandate until Stilley completes the administrative process and court litigation of his claims of right of access to the courts; and such other and further relief as may be appropriate whether or not specifically prayed.

By:  /s/ Oscar Stilley\_                      November 22, 2011  
Oscar Stilley #10579-062  
FCC Forrest City Low  
PO Box 9000  
Forrest City, AR 72336-9000

### **CERTIFICATE OF SERVICE**

I Oscar Stilley by my signature above certify that I served this document on opposing counsel by CM/ECF at the time of filing, and on Lindsey Springer by means of electronic transmission.