IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 06:50164-01
	)	
TOMMY K. CRYER,	)	
	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL TRIAL BRIEF

Comes now the Defendant, Tommy K. Cryer, through his undersigned counsel, and submits the following brief regarding issues that arose during a pre-trial conference on July 6, 2007, relating to "intent" evidence that Cryer may offer through his testimony at trial, and the implications of *United States v. Simkanin*, 420 F.3d 397 (5th Cir. 2005). Respectfully, the defense submits that via *Cheek* and its progeny, a defendant's beliefs, whether reasonable or unreasonable, are grist for the jury to decide in determining whether the defendant acted willfully. Even if a trial court concludes that such beliefs are unreasonable, that matter is properly the subject of a limiting instruction, not exclusion of such testimony. See *Burton*, infra.

Prior to 1991, Seventh Circuit decisional authorities held that, in tax prosecutions, a criminal defendant's beliefs about the tax laws had to be "objectively reasonable." In *Cheek v. United States*, 882 F.2d 1263, 1267 (7th Cir. 1989), the defendant argued on appeal that the Seventh Circuit's reasonableness test in this respect was erroneous. In addressing this argument, the Seventh Circuit in *Cheek* held:

> Cheek argues that the district court erred in instructing the jury that such a good faith misunderstanding of the law must to "objectively reasonable." Cheek contends that every other circuit that has ruled on the issue of whether a good faith misunderstanding of the law must be objectively reasonable has decided to the contrary, and has adhered to a subjective standard of reasonableness. See, e.g., *United States v. Whiteside*, 810 F.2d 1306, 1310 (5th Cir. 1987); *United States v. Phillips*, 775 F.2d 262, 264 (10th Cir. 1985); *United States v. Aitken*, 755 F.2d 188, 191 (1st Cir. 1985); *Cooley v. United States*, 501 F.2d 1249, 1253 n. 4 (9th Cir. 1974), cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir.), cert. denied, 1487 (1956); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); see also *United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983) (good faith misunderstanding of the law negates willfulness, but a good faith disagreement does not); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.), cert. denied, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983) (defendant's subjective intent is a jury question).
>
> Regardless of what the other circuits have ruled on this issue, this circuit has, in recent years, emphatically adhered to the "objectively reasonable" standard. See, e.g., *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987); *United States v. Davenport*, 824 F.2d 1511, 1517-18 (7th Cir. 1987); *Bressler*, 772 F.2d at 290; *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981). To the extent that this court's opinion in *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984) could be interpreted to mean that an "objectively unreasonable" belief can negate willfulness, our later cases have made it clear that this is not so. Thus, the district court did not err in instructing the jury that an "objectively reasonable" good faith misunderstanding of the law negates willfulness.

The Seventh Circuit noted that the Fifth Circuit, as well as many others, held otherwise. There being an obvious split in the circuits regarding this issue, it was ripe for review by the Supreme Court.

Cheek filed for certiorari with the Supreme Court, and it was granted. In *Cheek v. United States*, 498 U.S. 192, 201-02, 111 S.Ct. 604 (1991), the Supreme Court reversed this Seventh Circuit decision and held that, in tax prosecutions, a defendants beliefs

offered in defense need not be objectively reasonable:

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. We deal first with the case where the issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating, a case in which there is no claim that the provision at issue is invalid. In such a case, if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that, because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, ***whether or not the claimed belief or misunderstanding is objectively reasonable***. [emphasis added]

The "aftermath" of the decision in *Cheek* saw the reversal by several circuits of similarly erroneous jury instructions given in then recent tax trials. For example, in *United States v. Pabisz*, 936 F.2d 80, 83 (2nd Cir. 1991), that court reversed on the basis of *Cheek* a conviction arising from an erroneous jury instruction:

> In rejecting the Seventh Circuit's objective reasonableness test for good faith, the Court made clear that a trial court may not instruct a jury that, to negate the knowledge component of the willfulness requirement, a defendant's good faith belief that the tax laws did not impose any duty on him must be objectively reasonable.

And in *United States v. Powell*, 955 F.2d 1206, 1211-12 (9th Cir. 1991), that court reversed a conviction where an erroneous "willfulness" instruction had been given:

> The premise of *Cheek* is that a person cannot be convicted of willful failure to file a tax return if he subjectively believes in good faith that the tax laws do not apply

> to him. The test does not focus on the knowledge of the reasonable person, but rather on the knowledge of the defendant. As the Supreme Court explained: "In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." Id.
>
> Given the emphasis in *Cheek* on the defendant's subjective belief, and the specific holding that the belief need not be objectively reasonable, the district court's reference to "reasonable grounds for belief" was misplaced. The vice of the jury instruction given is that it did not make clear that the defendant must demonstrate only that a subjective good faith belief is held and not that the belief must also be found to be objectively reasonable. The jury is not precluded from considering the reasonableness of the interpretation of the law in weighing the credibility of the claim that the Powells subjectively believed that the law did not require that they file income tax returns. Still, the jury may not substitute its own determination of objective reasonableness as to the interpretation of the law in place of what the defendant subjectively believed. As given, the instruction misled the jury regarding the good faith defense and constitutes prejudicial error. Cf. Notaro v. United States, 363 F.2d 169, 173-76 (9th Cir. 1966). We reverse on this ground. On retrial, the district court should instruct the jury only as to the subjective standard.

In *United States v. Gaumer*, 972 F.2d 723, 724 (6th Cir. 1992), that court was confronted with the issue of whether relevant evidence regarding Gaumer's intent was erroneously excluded, and in reversing, that court held:

> In *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), the Supreme Court held that a defendant may not be convicted of willfully failing to file tax returns if he held a subjective belief that the law did not impose such a duty upon him. The Court noted that "it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Id., at 724.
>
> Mr. Gaumer should therefore have been allowed to present the contents of the exhibits to the jury to the extent that the material was relevant.

> This does not mean that the trial court was required to permit the physical introduction of exhibits comprising hundreds of pages. At a minimum, however, defendant Gaumer should have been allowed to read relevant excerpts to the jury. And if the physical exhibits were to be kept out, the defendant should have been so advised before it was too late for him to introduce excerpts orally. Id., at 725.

Clearly, whether a defendant's beliefs are reasonable or considered unreasonable has no bearing on the question of his intent, innocence or guilt.

The question of whether a trial court may require a defendant to make an offer of proof about whether his testimony is relevant because he may have beliefs that the tax laws are unconstitutional has already been addressed in *United States v. Burton*, 737 F.2d 439 (5th Cir. 1984). In *Burton*, the trial court had instructed the jury as a "matter of law that a good faith belief that wages are not income is not a defense to the charges in this case." On appeal, the prosecution argued like it had in the Seventh Circuit that a defendant's beliefs had to be reasonable, which the Fifth Circuit rejected:

> But the government argues that such a claim of subjective innocence must be "objectively reasonable." In short, the government urges us to conclude that it is the judge who first decides whether a defendant's claim is sufficiently credible to be considered by the jury. Persuaded that a limit of objective reasonableness improperly diminishes the jury's role, we reject the argument.
>
> There is a temptation for judges to decide that a defendant's claim is too incredible. This temptation is reinforced by concern that a defendant is being allowed to escape the reach of settled legal rules by erroneous arguments to a jury in an abuse of the roles of counsel and the court. Moreover, there may be concern that such objective limitations by the judge are necessary to prevent confusing "proofs" of law as an evidentiary fact. Each such concern is understandable but unfounded. The quick answer is that, apart from constitutional strictures explained in *United States v. Johnson*, such limitations upon defendants serve no practical purpose, for they will not materially affect the nature of the trial evidence or the trial. A jury is the ultimate discipline to a silly argument. Here the district court was understandably frustrated by the implausibility of Burton's contention, but he ought not have taken the question from the jury. Id. at 442-43.

Here, Cryer's defense is not that the tax laws are unconstitutional or invalid; in

fact, his testimony will be otherwise. Nor does he disagree with the income tax laws, as he understands them. He should be allowed to fully testify about his beliefs, the jury is entitled to hear his explanations, and the jury is entitled to determine based on that testimony whether Cryer acted willfully. But even if some evidence in this respect should be presented to the jury, still it is the jury that decides the weight of this testimony.

Respectfully submitted this the 8th day of July, 2007.

/s/ Lowell H. Becraft, Jr.
Lowell H. Becraft, Jr.
Attorney for Cryer
209 Lincoln Street
Huntsville, AL 35801
256-533-2535

/s/ George Harp
George Harp
Attorney for Cryer
610 Marshall Street, St. 619
Shreveport, LA 71101
318-424-2003

CERTIFICATE OF SERVICE

I hereby certify that I have this the 8th day of July, 2007, electronically filed this brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

Earl Campbell
U.S. Attorney's Office
300 Fannin Street, St. 3201
Shreveport, LA 71101

Dated this the 8th day of July, 2007.

/s/ Lowell H. Becraft, Jr.
Lowell H. Becraft, Jr.