04-6400-cr

To Be Argued By:
DAVID A. RING

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6400-cr

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

PATRICK A. TRIUMPH
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

DAVID A. RING
S. DAVE VATTI
SANDRA S. GLOVER
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The Defendant-Appellant ("defendant") filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). Judgment entered in the defendant's case on December 27, 2004, and the defendant filed his notice of appeal on December 16, 2004 (the date of sentencing). Doc. Nos. 362 & 363.[1] This Court has appellate jurisdiction over the defendant's challenges to his judgment of conviction pursuant to 28 U.S.C. § 1291.

---

[1] The following abbreviations will be used in this brief:

District Court docket number:	"Doc. No."
Brief filed by defendant's counsel:	"Def. Br."
Appendix filed by defendant's counsel:	"DA"
Defendant's *Pro Se* brief:	"*Pro Se* Br."
Trial transcript:	"Tr. [page #]"
Government Appendix:	"GA"

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court abused its discretion by allowing the Government to introduce evidence of the defendant's flight from prosecution as well as evidence of the defendant's prior intent to plead guilty, where the defendant's state of mind was at issue and the defendant opened the door to the testimony about his prior plea deal.

II. Whether the district court abused its discretion by denying the defendant's request to dismiss *both* the original indictment *and* the superseding indictment, based on the defendant's claim that the grand jury could not have returned the *original* indictment on the date stamped on the indictment and listed in the district court's docket.

III. Whether the district court committed plain error by failing to order the Government to provide tax information about potential jurors, even though the defendant did not ask for such information and the statute that would have allowed for such disclosure had been repealed in 1997.

IV. Whether the judgment should be vacated based on the claim that the Government violated the statute of limitations by adding certain counts to the superseding indictment, where the jury hung as to those specific counts and they were later dismissed.

V. Whether the district court abused its discretion by not dismissing two counts of the superseding indictment based on a claim that the Government failed to prove materiality, where an IRS agent explained that the deduction at issue might not have been allowed if the taxpayer had put down accurate information.

VI. Whether the district court abused its discretion by refusing to remit the bond it forfeited when the defendant fled the district, based on the defendant's claim that he was insane at the time of his flight and that, therefore, the forfeiture was unjust.

VII. Whether the district court committed plain error by failing to establish *sua sponte* that the defendant was knowingly and intelligently waiving his right to counsel at the time of his re-sentencing, even though the defendant had been representing himself for almost a year at that point and never asked for the reappointment of counsel.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6400-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

PATRICK A. TRIUMPH,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant was a self-employed tax preparer who prepared thousands of tax returns for his clients. When the Internal Revenue Service (IRS) began to scrutinize his returns, they noticed a significant pattern of fraud. As a general matter, the defendant was adding fictitious deductions and expenses to the tax returns (as well as performing other sleights of hand) for the purpose of improperly increasing the tax refunds that would be due to his clients. Not only was he doing this in regard to

returns that were scheduled to be filed with the IRS, but he also was filing amended returns, seeking additional, improper refunds for tax years gone by.

Ultimately, the defendant was charged with preparing fraudulent tax returns in connection with thirty-eight returns. In a superseding indictment he was also charged with flight (for fleeing to Canada after failing to appear for a change-of-plea), and with obstruction of an IRS investigation (for asking several witnesses to lie to the IRS and providing these witnesses with false documentation).

The defendant proceeded to trial in February 2004, but the trial abruptly ended when the defendant started to threaten his lawyer and act in an outrageous manner. The court declared a mistrial, found the defendant incompetent (over his objection), and sent him off for evaluation. A few months later the defendant was restored to competency and retried. This time around, the defendant chose to represent himself.

After a prolonged trial, the jury found the defendant guilty of ten counts of preparing false returns, and hung on the remaining counts. The Government later dismissed all remaining counts, and the defendant was sentenced to 33 months of imprisonment (which time he has already served).

The defendant raises seven issues on appeal (one issue briefed by his court-appointed counsel, the remaining issues raised in his *pro se* supplemental brief), and asks the Court to vacate his conviction. For the reasons that

follow, the defendant's arguments lack merit and the judgment below should be affirmed.

Statement of the Case

On March 21, 2002, a grand jury returned an indictment charging the defendant with thirty-eight counts of preparing false and fraudulent tax returns, in violation of Title 26, United States Code, Section 7206(2). Doc. No. 1; GA 1 (Indictment). On July 12, 2002, the defendant was scheduled to appear in court for a change of plea. Doc. No. 22. The defendant failed to appear and a warrant for his arrest was issued. *Id*. On or about July 2, 2003, the defendant was arrested in upstate New York (after he was returned to the United States from Canada), and on July 25, 2003, he was again presented in the District of Connecticut. Doc. No. 33.

On February 18, 2004, the defendant proceeded to jury trial in United States District Court for the District of Connecticut (Arterton, J.). Doc. No. 72. On February 23, the defendant's trial counsel moved for a competency hearing. Doc. No. 75. Over the next two days, the court found the defendant incompetent, ordered him evaluated, and declared a mistrial.[2] *See* Doc. Nos. 79-81.

---

[2] The trial court explained its decision to seek a competency evaluation as follows:

> Mr. Triumph's appearance before the court this morning with his fingers in his ears, rocking back and forth and praying aloud; his physically disruptive (continued...)

On June 29, 2004, the defendant was declared restored to competency and returned to the district. Doc. No. 103. On July 13, 2004, a grand jury returned a forty-count superseding indictment, again charging the defendant with thirty-eight counts of preparing false and fraudulent tax returns, in violation of Title 26, United States Code, Section 7206(2), and also charging him with obstructing the IRS, in violation of Title 26, United States Code, Section 7212(a) (count 39); and failure to appear, in violation of Title 18, United States Code, Section 3146(a)(1) (count 40). The superseding indictment also contained various factual allegations about the defendant's offense conduct, pursuant to *Blakely v. Washington,* 542 U.S. 296 (2004). *See* Doc. No. 102; GA 25, 36-37 (Superseding Indictment).

On August 25, 2004, the district court ordered a severance of count 40 of the indictment, based on the defendant's claim that he was insane at the time he fled the

---

[2] (...continued)

> behavior towards his attorney, such that the U.S. [M]arshals felt the need to physically subdue and restrain him; his repeated return to the same subjects of concern . . . His serious threat of harm to his counsel, and very importantly his counsel's opinion that he is absolutely unable to assist properly in his defense and expresses – has nothing expressed other than a paranoia that defense counsel is an arm of the government . . .

Doc. No. 164 (Ruling on Def.'s Mot. to Dismiss Indictment Due to Double Jeopardy), at 2 n.1 (quoting Feb. 23, 2004 Trial Tr. 931); GA 11.

jurisdiction. Doc. No. 158. On August 26, 2004, the defendant again proceeded to jury trial, but this time representing himself. On September 20, 2004, the jury found the defendant guilty on counts 5-8, 10-11, 16-17, 20, and 32. Doc. No. 247; GA 38 (Verdict Form). The jury hung on the remaining charges.[3] *Id.*

On December 16, 2004, the Government moved to dismiss all remaining counts of the superseding indictment, except count 40, which related to the defendant's flight from the district. Doc. No. 356. The court granted this motion. Doc. No. 361. On January 4, 2005, the United States moved to dismiss count 40. Doc. No. 374. The next day the court granted this motion as well. Doc. No. 381.

On December 16, 2004, the district court sentenced the defendant to 33 months of imprisonment, to run concurrently, on all counts of conviction. Doc. Nos. 360, 362; DA 181. The court also imposed one year of supervised release, and waived the imposition of a fine. *Id.* Judgment entered on December 27, 2004. Doc. No. 362.

The defendant filed his notice of appeal on December 16, 2004 (the date of his sentencing). Doc. No. 363. On March 25, 2005, the Court of Appeals remanded the case to the district court, pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On June 27, 2005, the

---

[3] The Government dismissed count two of the superseding indictment during trial. *See* Doc. No. 192.

district court held a new sentencing hearing (Doc. No. 435), and then imposed substantially the same sentence as before. Doc. No. 437; DA 179.

The defendant has completed his sentence and is now detained pending his removal from the United States on immigration charges.

Statement of Facts

The defendant was a self-employed tax preparer working in the Hartford, Connecticut area. In late 1996, after being alerted to possible fraud, the IRS began reviewing tax returns that the defendant prepared for the tax years 1993-1996. GA 76-77, 144. These returns included both original returns prepared by the defendant at about the time that his clients' tax returns were due, as well as *amended* returns in which the defendant sought additional refunds from the IRS based on a recalculation of his clients' past tax filings. GA 77-78.

Over the course of the investigation, the IRS found thousands of returns that had been prepared by the defendant. GA 145. Remarkably, he requested refunds from the IRS in about 97 percent of these returns. GA 140. Many of the returns appeared to contain fraudulent representations. GA 146. Rather than attempting to audit all of these returns, the IRS interviewed persons who called about their refunds (which had been frozen by the IRS), and who self-reported that information in their returns was false. GA 147-48.

The trial focused on thirty-seven[4] returns that were filed by twelve sets of individuals or married couples (who filed either individually or as married couples filing jointly). In preparing these returns, the defendant used various business names for his tax filing service. GA 104-05. He also listed various Employer Identification Numbers and Social Security Numbers, most of which were fraudulent.

The evidence at trial showed that the defendant routinely added fictitious deductions to his clients' tax returns, in order to fraudulently enhance his clients' refunds. Many, if not all, of his clients were unaware that the defendant was adding such fictitious information to their returns.

For example, counts five through eight related to returns filed by Sylvanius and Angella Downer. GA 362-68. On their amended 1994 return, the defendant listed a child-care credit for payments made to "The Home Club" in the amount of $4800. GA 299-301, 323-25. This expense, however, was fictitious. *Id.* Similarly, for the 1995 amended return, the defendant listed a child-care credit of $4850 for payments made to the "Homework Club," and these payments, too, were never made. *Id.* For 1996, the defendant filed separate returns for each of the Downers, claiming on Angella's return that she had a $950 child-care credit, and claiming on Sylvanius's that he had

---

[4] The thirty-eighth return was the subject of count two of superseding indictment and was dismissed by the Government during trial. Doc. No. 192.

a $4850 credit. *Id*. Again, the Downers had made no such payments and were entitled to no such credits. *Id.*

Counts ten and eleven related to Alston and Cynthia Creary. GA 368-74. On the Crearys' amended 1994 return, the defendant claimed a $10,000 gambling loss (to off-set income from gambling winnings), and a $1500 child-care credit for payments made to the Homework Club. GA 172-75, 186-87, 193-94. Testimony proved that the Crearys never told the defendant that they had these expenses, and that their true gambling loss would have been no more than $300. GA 186, 193-94. On the Crearys' 1995 amended return, the defendant grossly inflated the Crearys' deductions for gifts to charity, job expenses, union dues, and job related training, as well as their supposed child-care credit. GA 172-76, 187-194. All in all, the defendant added thousands of dollars to the Crearys' deductions and credits for their 1995 return. For both years combined, the Crearys received more than $2000 in refunds to which they were not entitled. GA 371-73.

Counts sixteen and seventeen related to Annette Shabazz. GA 377-80. On her 1995 amended return, the defendant claimed a $2400 child-care credit for payments supposedly made to the "Homework Sch," which payments she never made. GA 283, 292. On her 1996 return the defendant claimed $2450 in similar payments, which were never made. GA 287-88.

Count twenty related to Celestine Alston. GA 382-84. On her 1993 amended tax return, the defendant claimed a

host of deductions totaling $2773. GA 247-49, 258-60, 382-84. Ms. Alston, however, denied having any of these expenses or telling the defendant that she had. *Id.*

Count thirty-two related to Vincent Collins's 1993 amended return, in which the defendant claimed about $4000 in deductions for business expenses that Collins had not, in truth, incurred. GA 222-25, 391-93.

During the course of the trial, evidence also showed that the defendant attempted to obstruct justice and interfere with the IRS's criminal tax investigation. For instance, Angella Downer testified that the defendant gave her false receipts to give to the IRS, for the purpose of backing up the fictitious child-care credits. GA 307-09, 316. Similarly, Annette Shabazz testified that, before she met with the IRS, she spoke with the defendant and he told her to lie about her daycare expenses. GA 289-90. Also, Pekah Wallace testified that the defendant attempted to persuade her to claim that she had provided paid-for daycare (under the name "The Homework Club") to a number of his tax clients. Tr. 1716-19. All three of these witnesses admitted that they originally lied to the IRS at the defendant's insistence, but that they later admitted their lies and revealed what the defendant had told them.

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion by allowing the defendant's former counsel to testify about the defendant's flight from prosecution. The defendant's state of mind was at issue, and evidence of his flight was probative of this issue. Further, the court did not abuse its discretion by allowing the Government to elicit that the defendant had intended to plead guilty to certain charges in the indictment, after the defendant elicited lengthy testimony about his state of mind at the time that he fled as well as his supposed protestations of innocence. Finally, the district court's instruction on flight was evenly balanced and protected against the risk that the jury might equate flight with guilt.

II. The district court did not abuse its discretion by denying the defendant's request to dismiss the original and superseding indictments, based on the defendant's factual claim that the original indictment must have been returned on a date other than the one appearing on the face of the returned indictment and in the docket sheet. The defendant made no credible showing of abuse, and in any event, the defendant was convicted of charges brought in the superseding indictment, not the original one.

III. The district court did not commit plain error by failing to order the Government to provide the defendant with tax information about prospective jurors, given that the defendant made no specific request for such information and, even if he had, the statute which allowed for such disclosure had long been repealed.

IV. The district court did not commit plain error by failing to dismiss charges that were added to the superseding indictment based on the defendant's claim that these new charges violated the statute of limitations, given that the defendant was not convicted of any of the new charges, and these charges were later dismissed.

V. The district court did not abuse its discretion by failing to dismiss two counts of conviction based on the defendant's claim that the evidence failed to prove "materiality," where the Government introduced evidence at trial which showed that the alleged false statements were capable of influencing the Government.

VI. The district court did not abuse its discretion by failing to remit the bond that it forfeited when the defendant fled to Canada, because the defendant failed to carry his burden of showing that the forfeiture was unjust.

VII. The district court did not commit plain error by failing to canvass the defendant about his decision to proceed *pro se* at his re-sentencing, given that the defendant had been proceeding *pro se* for about a year at that time, and he had never once sought to relinquish his self-representation.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE ABOUT THE DEFENDANT'S FLIGHT AS WELL AS EVIDENCE OF HIS PRIOR WILLINGNESS TO PLEAD GUILTY

A. Relevant Facts

In its case-in-chief, the Government introduced evidence that in or about March 2002, the defendant was the subject of a federal indictment. GA 135. Following his arraignment, the defendant was released on bond with a condition that he appear in court as required. GA 136. The court scheduled trial for July 17, 2002. GA 137. The court later scheduled a change of plea for July 10, 2002, at which time the defendant was expected to plead guilty to several counts of the indictment.[5] DA 62. On the afternoon of July 9, 2002, defendant's then-counsel, Robert Percy, notified the defendant of the scheduled court proceeding and informed the defendant of the need to appear. DA 62. According to attorney Percy, the defendant understood the need to be present for that proceeding. DA 62. Although attorney Percy was present in court on July 10, the defendant failed to appear. DA 63.

---

[5] When the Government initially presented evidence of the defendant's flight at trial, the Government intentionally refrained from mentioning the purpose of the proceeding from which the defendant fled, *i.e.,* that it was a change-of-plea. DA 62.

When attorney Percy sought to contact the defendant on the defendant's cellular phone, he was only able to leave a message. DA 63.[6] The defendant also did not appear for jury selection on July 17, 2002. After the defendant failed to appear for trial, IRS agents sought to find him but were unable to do so. GA 137-38. Almost one year later, on May 14, 2003, the defendant was apprehended in Canada. GA 138. Attorney Percy did not have any contact with the defendant from the time of his non-appearance on July 10, 2002, until his arrest in Canada. DA 64.

The Government called attorney Percy as a witness at trial, to establish proof of the defendant's flight.[7] On cross-examination, the defendant sought to mitigate the inference that he had fled because he had knowledge of his guilt, and accordingly sought to introduce extensive information from Percy about his (the defendant's) state of mind at the time of his flight. Along this vein, on cross-examination, the defendant inquired "did Mr. Triumph in any way indicated [sic] his indictment may have been selective." DA 67. At an immediate sidebar, the court and the defendant engaged in the following discussion:

---

[6] The change-of-plea was reset for July 12, 2002, but the defendant failed to appear on that date as well. Doc. No. 22. The Government presented no testimony, however, that the defendant was aware that the matter had been continued to July 12.

[7] Percy was the only one who could establish that the defendant *knew* he was to appear in court on the day that he fled.

COURT: Are you waiving your attorney-client privilege?

TRIUMPH: Yes. Yes, I am. Oh, yeah.

* * *

COURT: Nothing he has said about scheduling of appearances, advising you of scheduling of appearance is attorney-client privileged.

TRIUMPH: I understand that.

COURT: There is nothing that has yet been testified to by Mr. Percy that in any way invades your relationship with him with respect to your representation.

TRIUMPH: Yes, your Honor.

COURT: And that is – that right is one that he must maintain and you have the right to have him maintain that.

TRIUMPH: And I would like to waive that.

* * *

COURT: All right, you need to think this through very carefully, Mr. Triumph,

> because you are headed in, what I would consider, to be a very wrong-minded direction, one that namely is not – one that is not going to be helpful to you because it will open the door potentially to the fact that you had negotiated a guilty plea, that you were scheduled to come to court to enter that guilty plea, that you failed to show up in court that day to enter a guilty plea, and this is – it would appear not favorable to you.

DA 67-69.

Following a recess in which the defendant consulted with his stand-by counsel, the following discussion occurred:

> COURT: Mr. Triumph, did you have an opportunity to consult with [standby counsel] over the lunch hour about the significance and implications of waiving attorney-client privilege as to your communications with Mr. Percy?
>
> TRIUMPH: Yes, and we – both the pros and cons, and I did consider the issue.

COURT: And you understand it is your right to maintain that confidentiality.

TRIUMPH: Absolutely.

COURT: Whatever you said to Mr. Percy.

TRIUMPH: Absolutely.

COURT: And you understand that once you waive it, it's not a selective waiver. In other words, once it's waived, anything that you discussed with Mr. Percy can be gone into by the government.

TRIUMPH: I do understand that, absolutely.

* * *

TRIUMPH: Yeah, I'm waiving my rights to attorney-client confidentiality.

COURT: So that all the discussions that you had with Mr. Percy about your defense in this precise case now can be gone into by the government on redirect examination. Do you understand that?

TRIUMPH: Yes, I do understand.

COURT: And to the extent that the discussions that you had implicate any aspect of your guilt on any of these counts, that will be gone into.

TRIUMPH: Absolutely, your Honor.

DA 72-74.

Following some additional discussion between the district court and the defendant in which the court again advised the defendant that he might open the door to potentially self-incriminating evidence (DA 74-83), the court noted:

COURT: All right, we need to just go along. I have described this to Mr. Triumph, and I have no doubt that he has understood what I'm saying, and understands that I am telling him this in an effort to be helpful to him. I will not permit any discussion of the plea negotiations or exchanges leading up to the plea negotiations or scheduling of a time for change of plea under 410, and whatever the redirect examination is based on Mr. Triumph's cross, will just remain to be seen. The fact that his – he is eliciting this testimony to negate an inference of consciousness of guilt means that questions directed to the

> converse, namely consciousness of guilt, would be proper. How they're phrased is a different matter. All right then, I'm satisfied, Mr. Triumph, that you have understood what I have told you about the purposes of attorney-client privilege, that you have thought about it, you've had extended discussions with your counsel, and that you have a purpose that you believe you wish to pursue understanding the downside, and I have now ruled on the issue of attorney – of under 410 plea discussions, so we will simply proceed. And, Mr. Percy, Mr. Triumph has waived his attorney-client privilege, and so questions which are asked, the answer to which implicate attorney-client communications, you may answer.[8]

DA 88.

---

[8] The district court also forewarned the defendant that if he were to offer explanations for his non-appearance at court proceedings through his attorney, discussions with his attorney that might implicate his guilt were not likely to be precluded under Rule 403 as more prejudicial than probative. The district court indicated that discussions with counsel implicating guilt were "central to the issue of consciousness of guilt." DA 81.

Subsequently, at the defendant's request, attorney Percy's continued testimony was postponed for a week so as to permit the defendant to reflect further upon whether he wished to waive the attorney-client privilege during his cross-examination of attorney Percy. DA 90-91. Prior to the resumption of attorney Percy's testimony, the court again advised the defendant of the risks of waiving his attorney-client privilege:

> COURT: Now we're not going to talk about that you were coming to Court to enter a plea of guilty, we've decided that is prohibited by the rules of evidence, but there is a lot of other testimony you open the door to . . . . You can't put in just what you want to put in without opening the door to a cross-examination that will elicit potentially prejudicial testimony, and so, therefore the law protects that no communications, no testimony about communications come in, your statements to your lawyer for the truth of the matter don't come in because they're hearsay, they can't come in to show what you were thinking about at the time, which you would then argue is consistent with a view you would be unfairly prosecuted, that you were in fact innocent, that you didn't think you

could prove it, or something like that.

TRIUMPH: Okay.

COURT: But along with that goes the bad half, which is all the communications that indicated that you knew you were guilty . . . .

TRIUMPH: Yes, your Honor. You certainly have made it very clear both sides, the pros and cons, and in careful consideration, I will certainly waive that privilege.

DA 107-109.

The court then again advised the defendant to consult for a final time with stand-by counsel. Following another brief recess, the defendant and the court had the following colloquy:

COURT: . . . anything further?

TRIUMPH: Yes, your Honor, we are ready to proceed with that waiver.

COURT: and your decision, sir?

TRIUMPH: is to waive the attorney-client privilege at this time.

COURT: and you've had a chance to speak with your stand-by counsel.

TRIUMPH: Yes, your Honor.

DA 110.

Thereafter, in an effort to offer alternative explanations for his flight, the defendant elicited from attorney Percy that the defendant had expressed concerns prior to his flight regarding the following: vindictive and selective prosecution (DA 115); potential prejudice in the manner in which the IRS investigation was conducted (DA 119-120); violations of his rights during the investigation (DA 122); harassment of his clients through the delay of refunds to them (DA 125); the lack of evidence against him (DA 125); being forced out of business (DA 126); the impact upon his family, including the health of his son (DA 129, 135-137); deportation, incarceration and resulting separation from his family (DA 137, 141-142); and financial difficulties created by the pending investigation and prosecution (DA 143-144). The defendant also elicited the following testimony from attorney Percy regarding discussions of the defendant's innocence:

TRIUMPH: Now, did Mr. Triumph clearly indicate to you that he's always maintained his innocence with these alleged offenses?

PERCY: You always professed that there were – you were dealing with a lot

> of clients and they were dealing with very few clients, and that you thought that these few clients could be – you know have issues with their own tax returns, yes. I don't know if we went into the issue of innocent. I mean, you did not believe the indictment was proper at the time.

DA 143.

On re-direct examination, the Government elicited from attorney Percy that in the time period immediately preceding the defendant's flight, the defendant had indicated a willingness to plead guilty to certain charges in the indictment.[9] DA 156. On re-cross examination by the defendant, attorney Percy acknowledged that the defendant had also indicated a strong desire to pursue a trial to fight for his innocence. DA 156.

---

[9] The defendant objected to this evidence, including on Rule 403 grounds that this evidence was more prejudicial than probative. The court overruled the objection, noting that the defendant had opened the door to this testimony and that it was very probative of his state of mind at the time of flight. DA 155. The court also declined to preclude this evidence under Fed. R. Evid. 410. DA 154-55.

B. Governing Law and Standard of Review

The defendant claims that the district court erred in admitting evidence of his flight and of the defendant's statement to his attorney that he was willing to plead guilty to some counts of the indictment. A district court has broad discretion in its decisions to admit or exclude evidence and testimony. Where, as here, a defendant's evidentiary challenges on appeal mirror his objections to that evidence at trial, the Court reviews the district court's decision to admit the evidence for abuse of discretion. *See, e.g.*, *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004); *see also United States v. Amuso*, 21 F.3d 1251, 1258-59 (2d Cir. 1994) (district court's evaluation of the potential prejudice of evidence of flight and the court's ultimate decision to admit it are generally reviewed for abuse of discretion). The trial court's rulings in this regard are subject to reversal only where manifestly erroneous or arbitrary and irrational. *See United States v. Yousef,* 327 F.3d 56, 156 (2d Cir. 2003); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001).

C. Discussion

It is well-accepted that an accused's flight is admissible as evidence of consciousness of guilt. *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002); *United States v. Sanchez*, 790 F.2d 245, 252 (2d Cir. 1986); *see also United States v. Salameh*, 152 F.3d 88, 157 (2d Cir. 1998) (where World Trade Center defendant had left country day after bombing with one-way ticket, without luggage and without his family, jury was entitled to infer consciousness

of guilt); *United States v. Martinez*, 681 F.2d 1248, 1256 (10th Cir. 1982) ("[F]light evidence carries with it a strong presumption of admissibility."). "The fact that a defendant's flight is subject to varying interpretations does not lead inevitably to the conclusion that the district court abused its discretion in admitting flight evidence." *Amuso*, 21 F.3d at 1258 (citing *United States v. Ayala*, 307 F.2d 574, 576 (2d Cir. 1962)). "[T]he accepted technique is for the judge to receive the evidence and permit the defendant to bring in evidence in denial or explanation." *Id.* (quoting *Ayala*, 307 F.2d at 576).

The threshold decision whether to admit evidence of a defendant's flight is a matter within the discretion of the trial court. *Id.* Where there is clear evidence that an accused "has not been seen by those to whom he is familiar, that he has left his customary residence, that those who have sought to find him have failed, and the like," there is a sufficient factual predicate suggesting the occurrence of flight. *Sanchez*, 790 F.2d at 252.

Here, an inference of flight is strongly supported by the defendant's indictment in March 2002; his disappearance on the date of a scheduled court appearance approximately four months later after being expressly notified about that court date; his failure to appear for trial within a week after the scheduled court proceeding; the inability of federal agents to locate him thereafter; and his later re-appearance nearly one year later in Canada. This, in turn, strongly supports a conclusion that the defendant's conduct was motivated by his consciousness of guilt with respect to the charges pending against him. *See, e.g.*,

United States v. Akers, 215 F.3d 1089, 1102-1103 (10th Cir. 2000) (evidence that defendant fled jurisdiction twelve days before trial properly admitted as probative of defendant's consciousness of guilt); *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1107 (9th Cir. 1979) (holding that flight a few days before trial supports an inference of consciousness of guilt).

The defendant suggests that the lapse of time between the commission of the offenses in 1996 and 1997 and the flight in 2002 undermines any inference that his flight was prompted by consciousness of guilt. Def. Br. 19-20. However, it is the link between the return of an indictment in March 2002, and the impending trial on that indictment in July 2002, which confirmed the reality of a criminal prosecution to the defendant. His flight within four months after indictment and within one week of trial provides an appropriate foundation for the inference of consciousness of guilt. Indeed, the facts surrounding the defendant's failure to appear for a scheduled court proceeding and for trial fall squarely within the framework of the factual predicate sanctioned in *Sanchez* for the admission of flight evidence. *See Sanchez*, 790 F.2d at 252 (evidence that the defendant has not been seen by those familiar with him, that he has left his residence, and that he cannot be located by those who have searched for him is sufficient to suggest flight). Accordingly, the district court did not abuse its discretion in admitting evidence of the defendant's flight.

Nor did the district court commit error by giving a standard instruction on consciousness of guilt from

evidence of flight. Indeed, the court labored to ensure that the instruction was balanced and consistent with the state of the evidence, ultimately giving the following instruction:

> You have heard evidence that the defendant left the jurisdiction during the course of the criminal proceedings against him. If proved, the flight of the defendant just prior to his required appearance for trial or scheduled court date may tend to prove that the defendant believed he was guilty. However, flight may not always reflect feelings of guilt. There may be reasons fully consistent with innocence that would cause a person to flee. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. You're specifically cautioned that evidence of flight alone is not sufficient, in and of itself, to establish guilt. Flight does not create any presumption of guilt.

DA 178.

The defendant claims that this instruction was improper because it was unbalanced and did not specifically reference the alternative explanations for flight that he had presented. The instruction, however, specifically cautioned the jury that there were reasons why a person might flee that were consistent with innocence and that flight does not always reflect feelings of guilt. DA 178. Although the instruction did not list the specific explanations that the defendant offered for his flight, the

defendant was free to argue those reasons to the jury, consistent with the court's charge. Because the court's charge fairly presented the defendant's theory to the jury, it was a proper instruction. *See Hernandez-Miranda*, 601 F.2d at 1107 (rejecting argument that flight instruction was improper because there were other reasons why the defendant might have fled; court noted that instruction properly apprised jury of this defense theory); *see also United States v. Russo*, 74 F.3d 1383, 1393 (2d Cir. 1996) (defendant is entitled to have theory of defense presented in charge to jury, but not entitled to have precise language he proposes read to the jury; trial court is given broad discretion to craft jury charge). In sum, because the evidence at trial supported an inference of consciousness of guilt from evidence of flight and because the court cautioned the jury that it could not establish the defendant's guilt upon evidence of flight alone, the district court did not commit error in its charge.

Nor did the court err in admitting evidence that the defendant had indicated to his counsel a willingness to plead guilty to some of the pending charges where the defendant chose to mitigate any inference of consciousness of guilt from his flight by offering evidence that he told his attorney of his concerns of vindictive prosecution (DA 115), prejudice (DA 119-120), fear of deportation and separation from his family (DA 137, 141-142), financial distress (DA 143-144) and his belief that the indictment was inappropriate (DA 143).

As a preliminary matter, the defendant claims that "the only witness from whom [he] could bring in evidence in

denial or explanation was his lawyer, Robert Percy." Def. Br. 21. That was not the case. The defendant's declarations that were relevant to his state of mind immediately prior to his flight that he elicited from his attorney could just as easily have been introduced through a family member, thus allowing the defendant to preserve attorney-client confidentiality.[10] To the extent that the defendant opted to introduce this evidence through his attorney because of some perceived strategic value, he did so after knowingly and voluntarily waiving the attorney-client privilege and with full knowledge of the attendant risk that he would open the door to all discussions with counsel that were probative of his state of mind prior to flight.

It is well-settled that a district court's finding of waiver of the attorney-client privilege is reviewed for abuse of discretion. *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995). The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "However, the attorney-client privilege cannot at once be used as a shield and a sword."

---

[10] Indeed, during the trial, the defendant called his brother, Clyde Triumph, as an expert witness to testify regarding issues of materiality and tax loss. It is difficult to imagine that the defendant could not have elicited testimony from a family member regarding his state of mind in the days preceding his flight.

United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991); *see also In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987). "In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *Bilzerian*, 926 F.2d at 1292-1293.

Here, the defendant knowingly and voluntarily waived his privilege after having extensive time to reflect upon the decision. The district court advised the defendant that he could assert the privilege if he so desired and that his communications with attorney Percy would be protected. DA 67-68, 72-73. On multiple occasions, the district court explained to the defendant the serious ramifications of introducing through attorney Percy statements made by the defendant suggesting alternate explanations for his flight other than consciousness of guilt, including the fact that the defendant would open the door to statements he made to his counsel that suggested an awareness of guilt. DA 73-74, 88, 107-109. The defendant was afforded several opportunities to consult with stand-by counsel. DA 72-73, 90-91, 110. The defendant had approximately one week to reflect upon the risks and benefits of any decision to waive the privilege. DA 90-91. Prior to his cross-examination of attorney Percy, the defendant unequivocally acknowledged that he understood the peril he faced if he waived the privilege and the potential evidence to which he might open the door. DA 107-109. As the record in the district court indicates, the

defendant's decision to waive the privilege was knowing, voluntary, and a product of careful deliberation.

Once the defendant chose to waive the privilege and disclose selected communications for self-serving purposes, he was not entitled to use the privilege to prevent disclosure of related damaging communications. *See von Bulow*, 828 F.2d at 101-102 (discussing waiver of attorney-client privilege). After the defendant offered statements he made to counsel to rebut an inference of consciousness of guilt, all communications he had with his attorney probative of his state of mind prior to his flight were fairly the subject of inquiry by the government. In other words, after the defendant attempted to mitigate consciousness of guilt by offering evidence that he had discussed the impropriety of the indictment with his attorney, it was entirely proper for the government to elicit from counsel the defendant's willingness to plead guilty to some of those same charges.

Nor was the probative value of the defendant's willingness to plead to some of the charges substantially outweighed by its potential for prejudice. "To be sure, *all* evidence incriminating a defendant is, in one sense of the term, 'prejudicial' to him: that is, it does harm to him. . . . What 'prejudice' as used in Rule 403 means is that the admission is, as the rule itself literally requires, 'unfair' rather than 'harmful.'" *United States v. Jimenez*, 789 F.2d 167, 171 (2d Cir. 1986). The admission of such evidence cannot be deemed unfair where defendant himself chose to open the door to that testimony.

In any event, as the trial record reveals, the defendant's strategic choice to waive the attorney-client privilege and offer evidence through attorney Percy may very well have paid off in that his former counsel's testimony may have helped him much more than it hurt him. It was by no means clear from his attorney's testimony that the defendant had, indeed, intended to plead guilty because the defendant believed he was guilty. Indeed, attorney Percy did no more than merely indicate that defendant had been willing to plead guilty to some of the charges in the indictment. DA 1950. Attorney Percy did not specify which charges those were. *Id.* More importantly, attorney Percy did not testify that the defendant ever expressed a belief that he, in fact, was guilty. Instead, as the following exchange between the defendant and attorney Percy on re-cross examination illustrates, attorney Percy made sure not to leave the impression that the defendant expressed a belief in his guilt:

> TRIUMPH: In the final phase of the indictment, did Mr. Triumph in fact say that he's guilty of any of those counts?
>
> PERCY: I do not believe you – you indicated you were willing to plead guilty to those counts, that's what I said.
>
> TRIUMPH: Yeah, that's different. . . .

DA 1952.

Alongside this testimony, the defendant was able to offer through attorney Percy several alternative reasons for his flight (DA 115, 119-126, 129, 135-144) and was able to elicit testimony from his counsel that he had expressed interest in going to trial to fight for his innocence (DA 156) and that the indictment was inappropriate and was unsupported by evidence. (DA 125, 143). In effect, not only was the defendant able to offer evidence to rebut flight as evidence of consciousness of guilt and to suggest his innocence, but he was able to do so without having to take the witness stand and subject himself to cross-examination.

Given the totality of attorney Percy's testimony, it is unlikely the jury accorded much significance to the defendant's willingness to plead guilty to some unspecified charges of the indictment. On this record, even if the district court erred in admitting this evidence (and it did *not*), any such error was harmless. *See United States v. Rivera*, 22 F.3d 430, 436 (2d Cir. 1994) (erroneous admission of evidence is harmless "'if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury'") (quoting *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992)).

Moreover, this Court has repeatedly held that "[w]here there is overwhelming evidence of guilt, as there was here, erroneous evidentiary rulings on . . . collateral matters are often harmless." *United States v. Corey*, 566 F.2d 429, 432 (2d Cir. 1977). With respect to the counts of conviction, as described more completely above, *see*

Statement of Facts, *supra*, there was substantial evidence that the defendant prepared tax returns in which he included fraudulent deductions and child care credits that he knew the taxpayers were not entitled to claim. *See, e.g.*, GA 172-76, 186, 193, 222-25, 247-49, 258-60, 283, 292, 299-301, 323-25.

Furthermore, the fact that the jury reached a guilty verdict on only certain counts of the indictment and was unable to reach a verdict on many others suggests that the jury analyzed each count of the indictment individually and did not simply reach a blanket conclusion of guilt simply because there had been evidence suggesting consciousness of guilt. *See, e.g.*, *United States v. Variano*, 550 F. 2d 1330, 1334 (2d Cir. 1977) (split verdict and jury's questions demonstrated that jury understood court's instructions to disregard evidence that related solely to conspiracy count that was dismissed during trial and that such evidence had no spillover effect); *United States v. Bieganowski*, 313 F.3d 264, 288 (5th Cir. 2002) (acquittal of one defendant on three of five counts and another defendant on two counts supported conclusion that jury properly followed court's instructions to consider evidence separately with respect to each defendant); *United States v. Nixon*, 918 F.2d 895, 906 (11th Cir. 1990) (split verdict where one defendant acquitted of all charges indicates that jury considered evidence carefully and refuted allegation that failure to grant severance was prejudicial).

Here, based on the district court's cautionary instructions that evidence of flight in and of itself is an insufficient basis for a finding of guilt and that there may

be reasons for flight other than consciousness of guilt, the defendant's evidence offered in rebuttal of any consciousness of guilt, and the independent evidence of the defendant's guilt, it cannot be said that any prejudice resulted from the introduction of the challenged evidence. In other words, it cannot be said that the evidence, even if erroneously admitted, substantially influenced the jury's verdict. Accordingly, if there had been any error, it would have been harmless.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENDANT'S REQUEST TO DISMISS THE SUPERSEDING INDICTMENT

A. Relevant Facts

The defendant claims that the original indictment was *not* returned on March 21, 2002 as reflected in the district court record. *Pro Se* Br. 5-7.[11] Weighing heavily against

---

[11] According to the defendant, the alleged falsity of the filing date is proven (i) by an affidavit filed by his friend, Angella Thompson, in which Thompson claims she did not testify on the date which appears on her grand jury transcript; (ii) by the defendant's own personal assertion that a Government witness met with the prosecutor in his office on the same day that the transcript shows that the witness testified before the grand jury (thus making her appearance before the grand jury on that day somehow "questionable"); and (iii) by the fact that the original prosecutor filed his appearance in the case on the same day that the indictment was returned and the (continued...)

the defendant's claim is the fact that the original indictment, on its face, is stamped as being filed "March 21, 2002"; the fact that a certified copy of the indictment is dated March 21, 2002 (on the last page); and the fact that the district court's docket shows March 21, 2002 as the filing date. Doc. No. 1; GA 1-10 (certified copy of original indictment).

The defendant makes no claim of prosecutorial (or Clerk's Office) impropriety in regard to the superseding indictment.

The defendant first raised his claim of misconduct regarding the return-date of the original indictment on the day that his first trial was halted and he was ordered to be evaluated by a psychiatrist. Doc. No. 76. Presumably because the defendant was soon after deemed incompetent, and because the defendant was represented by counsel at the time, the district court did not rule on this motion.

The defendant renewed this claim, however, in various subsequent motions to dismiss and for discovery. *See* Doc. Nos. 289, 290 & 303. The court denied all of these motions in an omnibus ruling dated December 15, 2004. Doc. No. 355; GA 53-54 (Ruling). Specifically, the court held:

> . . . Defendant has submitted an affidavit by Angella C. Thompson, in which she states that she

---

[11] (...continued)
case was opened. *See Pro Se* Br. 5-7.

> recalls that she testified before the grand jury on March 26, 2002, a date she associates with a friend's birthday, not March 19, 2002. She does not challenge or retract the substance of her testimony. Defendant also notes that Assistant U.S. Attorney David Sullivan was added as an attorney on the Court's docket on the day the indictment was returned.
>
> Where there is a claim of prosecutorial misconduct before the grand jury, "[d]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is a 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (citation omitted). The new evidence and arguments defendant presents provide no basis for finding that any misconduct occurred before the grand jury, and have no bearing on the grand jury's decision to indict. Accordingly, the Court declines to reconsider its earlier decision denying defendant's motion for disclosure of matters occurring before the grand jury, and motion to dismiss [the] indictment due to prosecutorial misconduct before the grand jury.

Id.

B. Governing Law and Standard of Review

Grand jury proceedings carry a presumption of regularity. *Hamling v. United States,* 418 U.S. 87, 139 n.23 (1974); *accord United States v. Calandra,* 414 U.S. 338, 345 (1974); *United States v. Torres,* 901 F.2d 205, 232-33 (2d Cir. 1990). "[A]s a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988); *accord Torres,* 901 F.2d at 233.

Dismissal of an indictment is a "drastic" and "extreme" remedy for prosecutorial misconduct. *United States v. Fields,* 592 F.2d 638, 646-47 (2d Cir. 1978). An indictment may be dismissed because of misconduct occurring before a grand jury only where the misconduct prejudiced the defendant. *See United States v. Mechanik*, 475 U.S. 66, 71-72 (1986); *United States v. Friedman,* 854 F.2d 535, 583 (2d Cir. 1988). Typically a supervening jury verdict makes the remedy of dismissal inappropriate, given that a petite jury's guilty verdict proves the defendant's guilt beyond a reasonable doubt. *Mechanik*, 475 U.S. at 70.

A district court's refusal to dismiss an indictment based on claims of misconduct is reviewed for abuse of discretion. *Fields,* 592 F.2d at 646-47.

C. Discussion

The defendant's factual claim that the original indictment was returned on a date other than that appearing in the docket sheet rests on tenuous grounds, at best. His friend's affidavit does not provide firm proof that she testified on a day other than that reported on her transcript. Nor does the fact that the prosecutor filed his appearance on the day the case was opened carry much weight. And, of course, the "fact" that the defendant claims to have seen a witness with the prosecutor on the same day that the record shows the witness testified before the grand jury does nothing to bolster his claim. In short, the speculative claims offered by the defendant do little to counter-balance the very strong showing that the indictment was, in fact, returned on March 21, 2002.

In any event, even if the defendant's allegations were true, there would still be no remedy available to him. He only claims that there was "abuse" (*i.e.*, an error in reporting the date of indictment) in regard to the *original* indictment. He makes no claim of abuse in regard to the *superseding* indictment, which was returned by a different grand jury. *Compare* GA 1, *with* GA 25. Thus, even if there had been some abuse regarding the recording date of the *original* indictment, such alleged abuse could not possibly have harmed the defendant, given that his conviction was based on the *superseding* indictment.

In sum, the defendant's claim that his due process rights were violated is entirely unfounded, and the district

court did not abuse its discretion by denying the defendant's claim for relief.

III. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY FAILING TO ORDER THE GOVERNMENT TO DISCLOSE TAX INFORMATION

A. Relevant Facts

As the defendant appears to concede, he made no written pre-trial request for juror tax information, pursuant to the version of 26 U.S.C. § 6103(h)(5) that was repealed in 1997. *See Pro Se* Br. 16-17. Likewise, the defendant fails to point to any place in the record where he made an oral request for such information. Finally, the defendant fails to point to any place in the record (and the Government can find none) in which he claimed *after the fact* that the district court erred by not compelling the Government to provide such information.

B. Governing Law and Standard of Review

Prior to 1997, 26 U.S.C. § 6103(h)(5) provided:

> In connection with any judicial proceeding . . . to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is

> a prospective juror in such proceeding has or has not been the subject of any audit or other investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

This provision was repealed by The Taxpayer Relief Act of 1997 (Pub. L. 105-34, August 5, 1997), and the repeal was made effective to cases commenced after the date of enactment. *See id.* § 1283(c), 111 Stat. 788, 1038.

Because the defendant did not raise this objection at the time of jury selection, his claim is reviewed only for plain error. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004). A claimed error not raised at trial may be corrected on appeal only if there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* (internal quotation marks omitted) (quoting *Johnson v. United States,* 520 U.S. 461, 467 (1997) (quoting *United States v. Olano,* 507 U.S. 725, 732 (1993))); (citing *United States v. Thomas,* 274 F.3d 655, 667 (2d Cir. 2001) (en banc)). "Where all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks and alterations omitted) (quoting *Johnson,* 520 U.S. at 467 (quoting *Olano,* 507 U.S. at 732)); (citing *Thomas,* 274 F.3d at 667). To warrant a remedy, the error must be so prejudicial that it "affected substantial rights," that is, it "must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 732-34. The defendant, not the Government, bears

the burden of persuasion with respect to a showing of prejudice. *See id.* at 734.

C. Discussion

The defendant's claim that his statutory rights under section 6103(h)(5) were violated must fail for two reasons. First and foremost, section 6103(h)(5) had been *repealed* long before his case commenced. Whereas the statute was repealed effective *August 5, 1997,* the defendant was not indicted until *March 21, 2002*. While the defendant claims that the repealed act should apply to his case because the IRS began their *investigation* of him in 1996 (*see Pro Se* Br. 14), the explicit language used by Congress when repealing this provision precludes any such a reading. The Taxpayer Relief Act of 1997 states in regard to section 6103(h)(5):

> (c) EFFECTIVE DATE.--The amendments made by this section shall apply to *judicial proceedings* commenced after the date of the enactment of this Act.

111 Stat. 788, 1038, § 1283(c) (emphasis added). As the statute makes clear, the repeal affects any *judicial proceeding* commenced after 1997. Accordingly, there should be no doubt that the repeal applies to this case.

Second, even if the statute had been in effect when the case was indicted (and it was *not*), the defendant failed to comply with it: he did not make a request for tax information regarding the potential jurors prior to jury

selection, and he certainly did not do so in writing (as required by the terms of the statute that was repealed). *See United States v. Hashimoto*, 878 F.2d 1126, 1130 (9th Cir. 1989); *cf. United States v. Young*, 822 F.2d 1234, 1239 (2d Cir. 1987) (failure to comply with statutory requirements under the Jury Selection Act results in waiver). Accordingly, the defendant would have waived any right to relief under the statute.

For these reasons, the district court did not commit *any* error by failing to order the Government to turn over taxpayer information regarding the potential jurors, not to mention *plain error.*

IV. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY REFUSING TO DISMISS TWO COUNTS BASED ON A STATUTE OF LIMITATIONS CLAIM

A. Relevant Facts

As noted above, the original indictment was returned on March 21, 2002, and the superseding indictment was returned on July 13, 2004. Doc. Nos. 1 & 102; GA 1 & 25. The superseding indictment added the following to the original indictment: (a) count 39, which charged the defendant with obstructing and impeding the IRS in or about March 1998, in violation of 26 U.S.C. § 7212(a); (b) count 40, which charged the defendant with failure to appear on July 10 and 17, 2002, in violation of 18 U.S.C. § 3146; and (c) a number of "allegations requiring specific findings," to include allegations that the tax loss was

greater than $40,000, that the defendant was in the business of preparing tax returns, and that the defendant obstructed justice. *See* GA 36-37. The special allegations were added to the indictment in response to the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. 296 (2004).

The jury was unable to reach a verdict on count thirty-nine, and the Government ultimately dismissed this charge. Doc. No. 356. Prior to trial, the district court severed count forty from the remaining counts, and the Government ultimately dismissed this charge as well. Doc. No. 374. As for the special findings, the jury provided specific loss figures for the counts of conviction, and found that the defendant was in the business of preparing taxes. GA 52. The jury also found that the defendant obstructed justice in regard to counts five through eight. GA 39-41.

At sentencing, the district court considered *all* of the defendant's relevant conduct, not just the conduct found beyond a reasonable doubt by the jury. *See* June 27, 2005 Tr. 27-31.

The defendant now claims on appeal that he moved the district court to dismiss the indictment based on a violation of the statute of limitations. *Pro Se* Br. 24 (citing a pleading dated August 7, 2004). The pleading to which he appears to refer (Doc. No. 115), however, contains no such claim. Similarly, the ruling to which the defendant points as denying his motion (Doc. No. 164), does not mention

any such claim. It is unclear whether the defendant raised this issue at any other point in the proceedings.[12]

B. Governing Law and Standard of Review

A statute of limitations claim presents "an affirmative defense" that is "not cognizable on appeal unless properly raised below." *United States v. Walsh,* 700 F.2d 846, 855-56 (2d Cir. 1983). Such defense, if raised, must be submitted to the jury (*United States v. Grammatikos,* 633 F.2d 1013, 1022 (2d Cir. 1980)), and failure to raise this defense before the conclusion of trial results in waiver. *United States v. Kelly,* 147 F.3d 172, 177 (2d Cir. 1998); *Walsh,* 700 F.2d at 855-56; *Grammatikos,* 633 F.2d at 1022-23.

In *United States v. Booker,* 543 U.S. 220 (2005), the Supreme Court held that the sentencing guidelines were advisory and rejected the notion that a jury must make special findings regarding guidelines factors. There is nothing improper, however, in submitting special verdicts to a jury for the purpose of obtaining advisory findings relevant to sentencing. *United States v. Pforzheimer,* 826 F.2d 200, 206 (2d Cir. 1987); *United States v. Stassi,* 544 F.2d 579, 583 (2d Cir. 1976).

---

[12] As the docket sheet shows, the defendant filed near-countless *pro se* pleadings, many of which covered a wide range of topics.

C. Discussion

The defendant's claim that the superseding indictment was filed in violation of the statute of limitations is a hollow one, even if it were not considered waived. The defendant was not convicted of *either* of the substantive offenses added to the indictment, and these charges were dismissed. Thus, even if there had been a statute of limitations violation (and there was *not*), it would have no bearing on the crimes of conviction.

Further, in regard to the special findings added to the superseding indictment, the Supreme Court's decision in *Booker* rendered this argument moot. While at the time the superseding indictment was returned it might have been argued that such findings were necessary for the imposition of an enhanced penalty, *Booker* put to rest any such claim. Accordingly, inclusion of the special findings in the indictment did not enhance the defendant's possible punishment, and thereby could not be viewed as "broadening" the charges against him and thereby

implicating the statute of limitations.[13] *See Pforzheimer,* 826 F.2d at 206; *Stassi,* 544 F.2d at 583.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENDANT'S REQUEST FOR A JUDGMENT OF ACQUITTAL ON COUNTS 16 & 17

A. Relevant Facts

Annette Shabazz testified at trial that the defendant prepared her amended 1995 tax return as well as her original 1996 return. GA 283, 286. She further explained that the returns showed child-care credits based on payments that she had supposedly made to "The Homework Sch." GA 283-88. For 1995, her supposed

---

[13] The defendant also argues that he was not provided sufficient notice of the superseding indictment, and thereby denied due process under the fifth amendment. *Pro Se* Br. 27-28. The record clearly shows, however, that the defendant was arraigned on the superseding indictment on July 30, 2004, and that he launched a detailed and specific challenge to the superseding indictment soon after. Doc. Nos. 110 (arraignment) & 115 (motion dated Aug. 7, 2004). The evidence supporting the superseding indictment was the same as that supporting the original indictment, and there was no compelling reason to add delay to the trial schedule because of the return of the superseding indictment. *See United States v. Rojas-Contreras,* 474 U.S. 231 (1985) (speedy trial act does not require thirty-day preparation period to run anew on filing of superseding indictment).

payment was $2400, and for 1996 it was supposedly $2450. *Id.* Shabazz testified, however, that her child never attended any such school, nor had she made these specific payments. *Id.* Further, she explained that when the IRS began investigating the matter, the defendant instructed her to lie about these supposed payments. GA 289-90.

The Government presented evidence to the jury regarding the "loss" attributable to the defendant's conduct in a manner that was consistent with the Second Circuit's decision in *United States v. Gordon,* 291 F.3d 181, 187-88 (2d Cir. 2002). In *Gordon*, the Second Circuit held that, when calculating tax loss for sentencing purposes, the intended or attempted loss can be off-set with unclaimed, but proper, deductions. *See Gordon,* 291 F.3d at 187-88. Because, under *Blakely,* the district court initially submitted the loss issue to the jury, the jury was allowed to consider evidence about tax deductions and credits that the defendant (and his clients) *could have* claimed, but did not. Along this vein, Shabazz testified that she made various payments for child-care that actually exceeded the amount listed by the defendant on her return. GA 378.

Based on Shabazz's testimony, an IRS agent testifying as an expert explained that the "loss" to the IRS resulting from the false statements on Shabazz's returns (when balanced with the unclaimed child-care expenses) would be zero.[14] GA 377-79. The expert tax witness explained,

---

[14] The jury, in its special interrogatories, also found the (continued...)

however, that the false information listed on Shabazz's tax returns would have impeded the ability of the IRS to verify the accuracy of her returns, because the false information could have caused the IRS not to seek to verify information about which the taxpayer lacked the necessary documentation. GA 378-80; *see* GA 132-34 (explaining child-care credit).

B. Governing Law and Standard of Review

Title 26, United States Code, Section 7206(2) provides, in relevant part, as follows:

> Any person who -- . . . (w)illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under . . . the internal revenue laws, of a return . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return [shall be guilty of an offense against the laws of the United States].

This offense requires the Government to prove:

> (1) that [the defendant] aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return, (2) that the return was

---

[14] (...continued)
loss to be zero. GA 44.

> fraudulent or false as to a material matter, and (3) that the act of the [defendant] was willful.

United States v. Klausner, 80 F.3d 55, 59 (2d Cir. 1996) (internal quotation omitted). "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Neder v. United States,* 527 U.S. 1, 16 (1999) (quoting *United States v. Gaudin,* 515 U.S. 506, 509 (1995)). Information provided on a tax return is "material" if the information "is capable of influencing or impeding the IRS in verifying or auditing the return. In other words, the test of materiality . . . is whether the information required to be reported on the tax return in question was necessary for the proper evaluation of the accuracy of the tax return . . . ." *United States v. Bok,* 156 F.3d 157, 164-65 (2d Cir. 1998) (quoting with favor the district court's jury instructions) (internal quotation marks omitted).

In *United States v. Dhinsa*, 243 F.3d 635, 648-49 (2d Cir. 2001), this Court set forth in detail the familiar standard for reviewing claims of insufficiency of the evidence:

> A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden. *See United States v. Walsh,* 194 F.3d 37, 51 (2d Cir. 1999). The evidence presented at trial should be viewed "in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of

> the government." *United States v. Walker,* 191 F.3d 326, 333 (2d Cir. 1999) (quotation marks omitted) . . . . We consider the evidence presented at trial "in its totality, not in isolation," but "may not substitute our own determinations of credibility or relative weight of the evidence for that of the jury." *United States v. Autuori,* 212 F.3d 105, 114 (2d Cir. 2000). "We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison,* 153 F.3d 34, 49 (2d Cir. 1998). Accordingly, we will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *see also United States v. Naiman,* 211 F.3d 40, 46 (2d Cir. 2000).

(Emphasis in original.)

C. Discussion

The defendant claims that, because the tax "loss" calculated by the Government and the jury was zero, the false statements that he placed on Shabazz's tax returns could not have been material. This argument confuses two distinct sets of issues.

First, application of the *materiality* requirement compels the conclusion that the false statement made on the tax return was *capable* of influencing the IRS. Here, the false statement on the return concealed the fact that Shabazz had no proper records or documentation regarding her child-care payments, and that, therefore, she could not properly seek this tax credit on her tax return. Thus, the false statements were, in fact, material. *See Bok,* 156 F.3d at 164-65.

Second, for *sentencing guidelines* purposes, the defendant was able to claim that the loss attributable to his false statements was mitigated by unclaimed credits that the taxpayer *could* have claimed. This is not to say that the taxpayer properly could have claimed this credit on her tax returns if she lacked the proper documentation, but it is to say that there was no actual loss to the Government. *See Gordon,* 291 F.3d at 187-88.

The defendant, in making his claim that "no loss" amounts to "no materiality," misses the point that the IRS may very well have disallowed the credit claimed by Shabazz if she had provided truthful information on her tax returns, but nonetheless this same truthful information was able to mitigate the loss to the Government under *Gordon*. If Shabazz had stated on her returns that she had paid some inexact amount of money to some unspecified recipient and possessed no receipts, she would not have been entitled to the requested tax credit. Nonetheless, under *Gordon*, the Government and jury were able to accept Shabazz's claims that she made such payments as sufficient to offset the losses caused by the defendant.

In sum, the evidence plainly supports the jury's finding that the false statements made in Shabazz's tax returns were material, even if the guidelines calculation of the "loss" was zero. *See Bok,* 156 F.3d at 164-65. Thus, the court did not abuse its discretion by failing to enter a judgment of acquittal on these charges.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO REMIT THE DEFENDANT'S FORFEITED BOND

A. Relevant Facts

On April 2, 2002, the defendant was released on a $75,000 bond that was secured by property located at 756 Park Avenue, Bloomfield, Connecticut. Doc. No. 4. The bond was signed by the defendant and his wife, who were principals of Towne and Country Realty LLC, which owned the property. Doc. No. 275.

On July 12, 2002, the defendant failed to appear for a change of plea and fled to Canada. Doc. No. 22. On March 11, 2003, the Government moved for a declaration of forfeiture, and on March 13 the district court granted the motion. Doc. Nos. 24-27.

On October 1, 2004, the defendant filed a *pro se* motion to set aside the forfeiture of his bond. Doc. No. 244. The defendant's primary contention was that the court should not have entered a "default" judgment against him because he was mentally ill when he fled from the district. *Id.* His claim that he was insane when he fled the

jurisdiction in July 2002 was based entirely on the finding of the court-appointed expert in February 2004 that he was incompetent to stand trial at that time. *Id.* The defendant did not, however, attempt to reconcile this finding with his repeated claims that the court *erroneously* found him to be incompetent in 2004 (*e.g.*, Doc. No. 115), or with the court's finding that he was competent to stand trial in June 2004, or with the finding that he was capable of representing himself. *See* Doc. Nos. 103, 106 & 114.[15]

The defendant failed to request an evidentiary hearing on this matter. *See* Doc. No. 244.

On October 21, 2004, the district court denied the defendant's motion to set aside the forfeiture order (while also deciding twenty-one other *pro se* post-trial motions). Doc. No. 278; GA 59 (Ruling). Specifically, the court ruled:

> Defendant's Motion to Set Aside Default Judgment [Doc. # 244] is DENIED. Default Judgment was properly entered under Fed. R. Crim. P. 46(f) in

---

[15] The record reveals that the district court denied multiple requests by the defendant for psychiatric evaluation. For example, on October 7, 2004, the defendant filed an emergency motion for a psychiatric exam to determine his competency (this was only a few weeks after he finished representing himself at his second trial), and then on October 8 he filed a motion to eliminate his standby counsel. Doc. Nos. 255 & 252. The court denied both of these motions, and found that he was not in need of psychiatric evaluation, despite his written claims to the contrary. Doc. No. 278.

> light of defendant's failure to appear. Defendant, moreover, has made no showing that he was incompetent at the time the default judgment was entered.

GA 61.

On November 12, 2004, the defendant filed a "Notice of Motion of Appeal" in regard to this ruling. Doc. No. 304. On December 3, 2004, he filed the actual notice of appeal, which he amended on December 14. Doc. Nos. 340 & 350.

B. Governing Law and Standard of Review

Fed. R. Crim. P. 46(f)(1) provides that a court *must* "declare the bail forfeited" if a "condition of the bond is breached." Rule 46(f)(3)(A) further provides that the court *must* enter a default judgment upon the Government's motion, if the court does not set the forfeiture aside. Rule 46(f)(4) provides that the court *may* remit part or all of the forfeiture after judgment is entered.

"The burden of establishing grounds for remission is on the party challenging the forfeiture." *United States v. Gambino*, 17 F.3d 572, 574 (2d Cir. 1994) (citing *United States v. Egan*, 394 F.2d 262, 267 (2d Cir. 1968)). "The decision whether to set aside . . . a forfeiture rests within the sound discretion of the district court and will be reversed only if the court acted arbitrarily or capriciously." *United States v. Santiago,* 826 F.2d 499, 505 (7th Cir. 1987) (quoting *United States v. Gutierrez,* 771 F.2d 1001,

1003 (7th Cir. 1985)); *accord Gambino*, 17 F.3d at 574; *United States v. Nguyen,* 279 F.3d 1112, 1115 (9th Cir. 2002). "Similarly . . . the district court's decision on a surety's request for a hearing on the motion is discretionary." *Santiago*, 826 F.2d at 505 (quoting *Gutierrez*, 771 F.2d at 1003); *United States v. Martinez*, 151 F.3d 68, 74 (2d Cir. 1998).

A motion for remission under Rule 46 "is a civil motion, not a criminal appeal." *United States v. Sar-Avi,* 255 F.3d 1163, 1167 (9th Cir. 2001) (citing *United States v. Vaccaro,* 51 F.3d 189, 191 (9th Cir. 1995)). Accordingly, a court's denial of a surety's motion for remission is deemed civil, and notice of appeal must be filed within sixty days. *See Santiago*, 826 F.2d at 502-503; Fed. R. App. P. 4(a)(1)(B).

C. Discussion

The defendant failed to carry the burden of showing that he was entitled to the remission of the forfeiture. The defendant repeatedly took the position that the district court had erred by finding him incompetent in February 2004 and thereby terminating his trial. *E.g.*, Doc. No. 115. Thus it was disingenuous of him, at best, to simultaneously claim that the same evidence that the court relied on to find him incompetent at the time of his first trial *also* proved that he was incompetent at the time of his flight.

The defendant argues at length that Fed. R. Civ. P. 55 prohibits the entry of a default judgment against an incompetent person, and that, therefore, the court's

forfeiture was in violation of the law. The defendant's argument misses the point: the district court imposed the default judgment against him pursuant to Fed. R. Crim. P. 46(f)(3)(A), *not* Fed. R. Civ. P. 55. *See* Fed. R. Crim. P. 46(f)(3)(A) ("If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment."). Thus, the limitations of Fed. R. Civ. P. 55 have no direct applicability to his forfeiture.

Concededly, the district court had the authority to remit the forfeiture if "justice [did] not require bail forfeiture." Fed. R. Crim. P. 46(f)(4) & (f)(2)(B). While the defendant pointed to the fact that a psychiatrist had found him incompetent in February 2004, he never did more in his motion for remission to show that he was incompetent at the time of his flight. *See* Doc. No. 244. Thus the defendant failed to carry his burden of showing that he was entitled to relief, and the court did not abuse its discretion in denying his motion for remission. *See Gambino*, 17 F.3d at 574.

VII. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY FAILING TO CANVASS THE DEFENDANT ON HIS CONTINUED DESIRE TO PROCEED *PRO SE* AT THE TIME OF RESENTENCING

A. Relevant Facts

On March 5, 2004, after the defendant's first trial ended in a mistrial (due to the district court's determination that the defendant was not competent to stand trial), the district court appointed new counsel for the defendant. Doc. No. 89. Not long after the defendant was certified as being restored to competence (June 29, 2004) and returned to the district, the defendant filed a letter-motion requesting new counsel to replace the attorney who had just been appointed to represent him. Doc. No. 104. The court denied the motion. Doc. No. 107. Soon thereafter, on August 4, 2004, the defendant made an oral motion to proceed *pro se*, and the court granted the motion, converting the defendant's appointed counsel to "standby" status. Doc. No. 114.

The defendant proceeded to trial with his appointed counsel acting in a standby capacity. Afterwards, the defendant filed a "Motion to Waive Stand-by Counsel In All Proceedings in District Court." Doc. No. 252; GA 64 (Motion). The court denied the defendant's motion, but in doing so found:

> Standby counsel may be appointed over the defendant's objection, to assist the defendant in complying with court procedures. Defendant here has represented himself fully throughout the course of this trial, and has maintained complete control over his case. Standby counsel has not interfered with defendant's right of self-representation.

GA 62.

On November 16, 2004, the defendant again moved for withdrawal of standby counsel. Doc. No. 312; GA 67 (Motion). In this motion, the defendant (among other things) pointed to the fact that an index to a transcript from the first trial mistakenly showed that the defendant's present counsel had been questioning one of the Government's witness, rather than Government counsel. This "fact," claimed the defendant, showed that his counsel was engaged in a conspiracy with the Government. *Id.* In response to this argument (and others), standby counsel himself moved to withdraw from the case. Doc. No. 324. The Government did not object to the defendant's request, Doc. No. 325, but the district court denied the motion, GA 58.

The defendant proceeded to represent himself at sentencing and on appeal. On April 25, 2005, the Court of Appeals remanded the case to the district court as part of a *Crosby* remand. Doc. No. 432. On June 27, 2005, the court conducted a new sentencing hearing, and then imposed substantially the same sentence as it had before. Doc. No. 435. At this resentencing, the defendant

appeared without standby counsel. June 27, 2005, Tr. 2. It appears from the record that the defendant never requested the appointment of new counsel, or the presence of his standby counsel. *Id.*

Because the defendant failed to raise this claim below, it should be reviewed for "plain error."

B. Governing Law and Standard of Review

A defendant has a constitutional right to represent himself at trial. *Faretta v. California,* 422 U.S. 806 (1975). A district court may, however, require standby counsel to be available to a *pro se* defendant, whether he wants such counsel or not. *Id.* at 834 n.46; *Williams v. Bartlett,* 44 F.3d 95, 100-102 (2d Cir. 1994). But there is no constitutional right to "hybrid" representation, by which the defendant may conduct part of the trial and standby counsel may conduct the balance. *McKaskle v. Wiggins,* 465 U.S. 168, 183 (1984); *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997). Similarly, there is no constitutional right to standby counsel. *Schmidt*, 105 F.3d at 90 (citing *United States v. Cochrane,* 985 F.2d 1027, 1029 & n.1 (9th Cir. 1993) (per curiam); *United States v. Windsor,* 981 F.2d 943, 947 (7th Cir. 1992)).

C. Discussion

The record clearly shows that, as of August 4, 2004, the defendant wanted to proceed *pro se* in his case. Indeed, at several junctures after that he sought to dismiss his standby counsel. *See* Doc. Nos. 252 & 312. Never

after August 4 did he ask for new counsel before the district court, nor did he seek to end his *pro se* status. Indeed, he did not seek to relinquish his *pro se* status before the Court of Appeals until May 8, 2006 – well after the *Crosby* remand. *See* Court of App. Docket Entry dated May 8, 2006.

When the defendant chose to proceed *pro se*, he waived his constitutional right to counsel.[16] *See Schmidt*, 105 F.3d at 90. Under these circumstances, the district court could not preclude the defendant from representing himself, without there being good cause to do so. *See Faretta,* 422 U.S. at 835 n.46. Accordingly, the defendant cannot now claim that the district court deprived him of his Sixth Amendment right to counsel by *not* overriding his expressed will to represent himself. *See id.* at 836; *McKaskle v. Wiggins,* 465 U.S. at 183.

While the defendant's claim of error is not crystal clear, it appears that he is not saying that the district court should have made sure that he had standby counsel at his resentencing, but rather that the court erred by failing to *canvass him again* regarding his continued *pro se* representation. *Pro Se* Br. 37. Yet the defendant can point to no reason why the court should have conducted such a canvass, given that the defendant made no complaints about proceeding *pro se* and was still filing a continual stream of *pro se* motions.

---

[16] The defendant does not claim that his August 4 waiver of his right to counsel was somehow deficient.

Accordingly, the court did not violate the defendant's Sixth Amendment rights by allowing him to continue with his *pro se* representation at resentencing, and the court surely did not commit plain error by not raising this issue on its own.

CONCLUSION

For the foregoing reasons, the defendant's judgment of conviction should be affirmed, and his appeal denied.

Dated: June 4, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

DAVID A. RING
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
S. DAVE VATTI
Assistant United States Attorneys (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,955 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

DAVID A. RING
ASSISTANT U.S. ATTORNEY

Addendum

Prior to amendments enacted in The Taxpayer Relief Act of 1997 (Pub. L. 105-34, August 5, 1997):

Title 26, United States Code, Section 6103(h)(5): Confidentiality and disclosure of returns and return information

* * *

(h) Disclosure to certain Federal officers and employees for purposes of tax administration, etc.--

* * *

(5) Prospective Jurors -- In connection with any judicial proceeding . . . to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

Title 26, United States Code, Section 7206: Fraud and false statements

Any person who --

* * *

(2) Aid or assistance. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under . . . the internal revenue laws, of a return . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return [shall be guilty of an offense against the laws of the United States].

Fed. R. Crim. P. 46. Release from Custody; Supervising Detention

* * *

(f) Bail Forfeiture.

(1) Declaration. The court must declare the bail forfeited if a condition of the bond is breached.

(2) Setting Aside. The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if:

(A) the surety later surrenders into custody the person released on the surety's appearance bond; or

(B) it appears that justice does not require bail forfeiture.

(3) Enforcement.

(A) Default Judgment and Execution. If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment.

(B) Jurisdiction and Service. By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its

agent to receive service of any filings affecting its liability.

(C) Motion to Enforce. The court may, upon the government's motion, enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address.

(4) Remission. After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).