No.

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY J. STUBBS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question No. 1

In *Kawashima v. Holder*, 565 U.S. 478 (2012), this Court held the elements of tax evasion do not necessarily involve fraud or deceit; and that § 7201 involves the two offenses of evading *assessment* of tax and evading *payment* of tax. Here, Stubbs provided all of his current and past financial records to the Government showing properly and truthfully his income and expenditures. The question presented is:

Does the Government meet its burden of proof in a tax evasion case (as opposed to failure to file) where the financial records of the accused are truthful, accurate, and contain no fraud?

Question No. 2

The sentence in this case was enhanced because of alleged "sophisticated means" used by Stubbs to evade taxes. Under the Guidelines, this enhancement is applicable when the accused uses "especially complex or especially intricate offense conduct" and includes conduct such as "hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." Stubbs did none of these things and his financial records were accurate and transparent. The question presented is:

Does the Government meet its burden of proving the existence of the "sophisticated means" enhancement in a case where the accused does not hide or conceal any aspect of his financial dealings?

Question No. 3

The sentence in this case was enhanced on the basis that Stubbs failed to report income exceeding $10,000.00 from *criminal* activity. Under the Guidelines, "criminal activity" means any conduct constituting a criminal offense under federal, state, local or foreign law. Here, the district court applied the "criminal activity" enhancement based on evidence showing, at most, civil fraud. The question presented for review is:

Does the Government meet its burden of proving the existence of the "criminal activity" enhancement when it fails to allege or prove any facts of a criminal offense?

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Timothy J. Stubbs petitions respectfully for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit decided this case by unpublished Order and Judgment filed February 26, 2019. *See* attached Appendix "A" (*United States v. Timothy J. Stubbs,* No. 17-1373 (10th Cir., February 26, 2019)).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered February 26, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7201, provides, in part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000.00 ($500,000.00 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

USSG § 2T1.1(b)(2), provides enhancement of sentence:

> "If the offense involved sophisticated means, increase by 2 levels."

USSG § 2T1.1(b)(1), provides enhancement of sentence:

> "If the defendant failed to report or to correctly identify the source of income exceeding $10,000.00 in any year from criminal activity, increase by 2 levels."

STATEMENT OF THE CASE

On October 21, 2013, a grand jury in Colorado issued an Indictment against Stubbs alleging two counts of Tax Evasion, three counts of failure to file corporate tax returns, and three counts of failure to file individual tax returns.

Jury trial commenced in Denver, Colorado, on October 14, 2015, in the courtroom of the Hon. Christine M. Arguello, with Stubbs proceeding *pro se*. At the conclusion of the evidence, the jury found him guilty on all counts.

Stubbs was sentenced formally on October 12, 2017, to 60 months on Count I; 16 months on Count II (consecutive to Count I), and 12 months on Counts III-VIII (to be served concurrently with each other, but consecutively to counts I and II), with three years of supervised release, and a fine of $50,000.00 and restitution (unpaid taxes) of $639,114.00.

Stubbs filed Notice of Appeal on October 30, 2015. The Tenth Circuit denied relief in an unpublished Order and Judgment on February 26, 2019.

STATEMENT OF THE FACTS

As Stubbs outlined in the Tenth Circuit below, this is a tax evasion/failure to file case in which the Government alleged that Stubbs evaded tax payment and failed to file personally and in his business during 2005, 2006, and 2007. As one might expect, these tax cases are document heavy, but as it turned out, Stubbs, proceeding in the trial court *pro se*, did not contest the basic facts of the case as alleged by the Government; rather, he defended on the ground that his conduct was not willful and that his reading of the law indicated to him that he was not a "person" in the legal sense and was therefore not legally obligated to pay taxes to the federal government.

Stubbs appeared at trial *pro se*, announcing his appearance as "Timothy John Stubbs.

Timothy-John of the House of Stubbs. On the first day of trial, Stubbs had objected to the jurisdiction of the trial court, and in fact asserted that he was not a citizen of the United States, having "renounced his 'private' state citizen/non-citizen national status."

The trial judge overruled the objection of Stubbs to the jurisdiction of the trial court to proceed, and also cautioned Stubbs that, as a *pro se* litigant, he had agreed to comply with the same rules that govern attorneys, and that if he violates those rules, then stand-by counsel–Ms. Lynn A. Pierce–would take over the defense.

Thus, Stubbs proceeded to trial charged with: 1) tax evasion/failure to file individual income taxes; 2) tax evasion/failure to file individual income tax; 3) failure to file corporate taxes (2005); 4) failure to file corporate taxes (2006); 5) failure to file corporate taxes (2007); 6) failure to file individual taxes (2005); 7) failure to file personal taxes (2006); and 8) failure to file personal taxes (2007).

During the Government's opening statement, it outlined the basic allegations. Stubbs ran a successful business called National Rebate Fund, Inc., during 2005, 2006, and 2007. It earned more than $7 million in gross income, and turned a profit of almost $1.8 million. Stubbs was the owner, president, and "100 shareholder" of the company. During these years, he purchased a half million dollar home in Colorado, also bought an $850,000.00 property in Hawaii with his sister; a vacation rental in Crested Butte that cost $1,595,000.00; and he started acquiring gold later, $360,000.00 in gold coins and another $14,000.00 in bars of silver.

In those three years, 2005-2007, Stubbs did not pay any income tax, either personal or corporate. According to the Government, "this is a case about a man who earned more than $2 million in taxable income during the 3 years charged in the Indictment, and who did not file tax

returns, did not pay one cent of income tax." The Government also asserted that Stubbs had failed to file an individual income tax return since 1992.

According to the Government, Stubbs owes $630,000.00 in taxes.

Stubbs introduced himself to the jury as Timothy-John of the House of Stubbs, and gave his own opening statement, telling the jury that "his truth" would be self-evident, and that he had acted in good faith beliefs without any willful criminal intent." His defense was that, going back to 1993, he had conducted diligent research which led him to the conclusion that he was under no legal obligation to file taxes.

The first witness called by the Government was Linda McElhaney. She was employed at Buckley Change Eye Institute (they do Lasik surgery and the like). Their marketing agency introduced them to National Rebate Fund. Customers could get 50% off their surgery fees if they followed the directions that came with the rebate form. They received training from National Rebate Fund, and basically the rebate could be claimed after four years.

The basic process was that once the customers had received the rebate form, they had to register within 17 days with the Fund Administrator; and then at 47 months, they had 30 days to claim the refund by registered mail. Essentially, the rebate was payable, but customers had to follow the directions exactly, and when they did not they could not get the rebate, which is called "slippage" and it was "the people who didn't do the rebate appropriately, that they are the ones that actually funded the people who did."

As an example of how this process worked, say that a customer spent $4,000.00 on eye surgery and signed up for the 50% rebate. National Rebate Fund would be paid 15% of the "half" (in this example, 15% of $2,000.00, or a total of $300.00).

From 2006-2008, Buckley paid NRF a total of $176,442.50 in rebates.

Alan Anderson was the President and owner of a company called Kool View, which he described as a home improvement contractor that sold products such as windows, sun rooms, and remodeling of bathrooms and basements. He did business with Stubbs and his company, National Rebate Fund, from 2005 through the middle of 2007.

As with Buckley, Kool View used NRF (which sometimes used the name National Energy Rebate Fund) to offer rebates to its customers, in the same way (15% of the contract price). In 2005, Kool View paid NRF $19,467.50; in 2006, it paid $253,722.34, and 2007 it paid $195,611.00–for an approximate total of $468,00.00.

The Government introduced an e-mail from Stubbs to Kool View regarding requests for tax documents (Kool View requested a TIN or Taxpayer Identification Number from Stubbs). Stubbs replied:

> You have invoices and cancelled checks as proof of payment of the marketing/advertising expense paid to our corporation. You will have a valid write-off of these invoiced expenses just like you do for your insurances, radio and print ads printing of marketing materials, et cetera. You do not need a TIN on our company, nor to report amounts paid to us as "income." The premiums collected by us are not our income and it is not proper to report it as such.

The jury heard next from Susan Duran, from Grand Junction, Colorado, who was employed at the Grand West Kia car dealership in the business office (she did accounting there).

At some point, she was employed by Stubbs as a bookkeeper at his company Elite Home Products, which sold and installed siding and windows; after that, she worked for Stubbs at NRF. She identified QuickBooks documents from 2004 showing just over $3 million as "NRF Income," and a Profit/Loss statement of 2004 through 2007 showing total income of $7,802,750.00, with a net

income of just over $2 million.

She also described how the rebate system at NRF worked administratively, including receiving the initial rebate registration cards, and then processing the rebates after the 47-month period if the customer followed the instructions. She actually had the role of administering the rebates, and in the event that there was a question about it and she disagreed with Stubbs about whether a customer was compliant, she made the final decision, not Stubbs.

She also sponsored exhibits from the Colorado Secretary of State showing corporate entities and the street address of NRF. She also was aware that Stubbs had property in Hawaii with his sister, Karen.

Finally, the Government asked her if she prepared her own income tax returns for 2005, 2006, and 2007; she replied that she did not. Stubbs did, because she trusted him and she needed his help.

Craig Severance was a CPA in Colorado who rented office space from Stubbs. He told the jury that Stubbs bought the building, but allowed him to stay for business continuity, that the name of Stubbs' business was National Energy Rebate Fund, Inc., and that he paid rent to Stubbs as landlord.

He told the jury that he did the taxes for an employee of NRF named Dan Golden, who was treated by NRF (Stubbs) as an independent contractor, but that he should not have been; rather, Golden should have been treated as an employee. Golden was getting checks, but there was no withholding for taxes or Social Security. However, after being initially treated as an independent contractor, Stubbs "fixed his status" the next year and he received a W-2 instead of an I-99.

At this point in the trial, the Government introduced certified bank records from U.S. Bank,

Wells Fargo Bank, Colorado Secretary of State, Bank of the West, Wells Fargo Home Mortgage, the county of Hawaii, public records from Gunnison County, Colorado, and Mesa County, Colorado, all admitted without objection from Stubbs.

Danny Joe Golden testified that he worked for Stubbs and NRF as a salesman, pushing the rebates, around October, 2006. He did this primarily by "prospecting" and finding his own leads, with some leads generated on the company web site. Windows/siding companies were prominent because they are typically large sales. He was also the trainer of the sales staff for the clients who signed up for the rebate program.

At the time, the staff of NRF was Tim Stubbs, his brother Matt, Susan Duran (the secretary), and Golden. When he was contacted by Special Agent Karen Gurgel of the Internal Revenue Service, he simply gave the hard drive on the server to the agents when they asked for it. On this hard drive was an e-mail to Kool View stating, "[W]e do not provide W-9 forms or any other IRS forms to our dealers. The premium is a marketing expense." He also told the jury that he believed that Tim and Matt Stubbs talked about, and purchased, gold coins and silver.

Special Agent Joel Churches was an agent with the IRS Criminal Investigation Division. He explained to the jury how search warrants work, how the premises are processed and photographed, and how he participated in a search, as the seizing agent, of a trailer in Whitewater, Colorado, in October, 2010, which netted records of NRF.

These records dealt with time clock reports for employees, and a loan application for $650,000.00 by Stubbs regarding a property in Hawaii.

Keri Taylor worked at Community Banks of Colorado and sponsored bank records for Stubbs on a bank account opened on January 29, 2007, which had transactions to Centennial Precious

Metals, and a check to Tim Stubbs from the NRF Trust.

The Government then called another IRS agent, Kristy Morgan, who introduced tax records on behalf of the Commissioner of NRF (Lack of Record for 2005, 2006, and 2007) and the Fund Administrator, certification for "lack of record" for Timothy J. Stubbs for tax periods of 2005, 2006, and 2007; and no withholding. Agent Morgan was recalled to tell the jury of the lack of records for Stubbs for tax periods 2002, 2003, and 2004, as well.

Agent Morgan also explained to the jury what an "S-Corp" was, and how the tax would "flow to the shareholders" which meant that they would report the income on their Form 1040, and the actual business would not be taxed. Tr. 170-71. NRF elected to be treated as an S-Corp, and Stubbs was the sole shareholder.

The IRS had no record of Stubbs filing an individual income tax return since 1992.

Jeffrey Jackson was also a records custodian for Bank of America, which loaned Stubbs $1,276,000.00, on September 1, 2006, another loan of $420,000.00 on June 15, 2005, and a third loan of $52,000.00 on June 20, 2005. A tax return for Stubbs (2002 Form 1040) was also introduced.

The import was that the IRS had no record of Stubbs filing a tax return in 2002, but one was submitted to the Bank of America; as was 2003; and the fact that Stubbs indicated payment of tax in his Bank of America records, but no tax was paid (in the amount if $73,642.00), and the same for 2004 and 2005.

IRS Revenue Agent Jean Flagg explained to the jury the monetary income thresholds that trigger tax filing obligations (which Stubbs met). She also reiterated that an S-Corp has flow-through aspects in that the income of the corporation is taxed at the shareholder level, and that an

S-Corp "generally does not pay income tax" but is still obligated to file a return.

She also pointed out that Stubbs should be stuck with a capital gain tax on the sale of property in 2005. As to the principal allegations, the total income for NRF in 2005 was $1,099,516.50, primarily from the rebate premiums, with a net income of $276,736.69; and that Stubbs' taxable income for 2005 was $693,648.00, and that he owes $156,903.00. She went through similar calculations for 2006 and 2007.

She summarized that the taxable income for Stubbs in the three years 2005, 2006, and 2007 was $2,169,168.00, resulting in a total tax of $639,114.00. She also noted that there was a $5,000.00 wire for the Hawaii property drawn on the NRF account, as well as checks written to Karen Stubbs (sister of the defendant) re the Hawaii properties.

The Government then rested its case. After being advised by stand-by counsel, Stubbs took the stand in his own behalf.

He testified that, in the spring of 1993, he learned and adopted a specific view of the Fourteenth Amendment, how it was not ratified properly, and that "we are not actually U.S. citizens we thought we were." Further, that the IRS "is not an agency of the United States Government"; nor is the Federal Reserve Bank.

These revelations prompted Stubbs to conduct his own research on the internet, start reading books on the subject (*How Anyone Can Stop Paying Income Taxes* by Irwin Schiff), and developing an understanding of what a federal citizen is, what a state citizen is, and what natural born status is. His conclusions, based upon his research, was:

> [T]he culmination of that has been that to this very moment, until the day I die, I understand that I am not a person, but that I am a man, and I am not subject to this jurisdiction that they are claiming over me, and neither are any of you.

He then explained in detail his research and beliefs, including his assertion that he notified the IRS of his beliefs, as well as the Attorney General, "and they never rebutted it." He testified that he mailed in his position four different times, but was disallowed to show the jury the documents.

Specifically, back in 2008, he walked into the IRS office and "asked for statements of the account." He was trying to figure out what they had and tried to "correct" his status. He followed up years later, but had moved to Costa Rica, which made it more difficult to follow-up, but he still tried to declare his status "and make it known to these agencies what my understanding of the true good-faith belief was of the law."

The IRS never responded to him.

During an extensive cross-examination, Stubbs essentially admitted to the basic facts as outlined by the Government, freely admitting that he did not file or pay the taxes at issue in the Indictment, acknowledging his income during this time, and that he made purchases of gold/silver.

Stubbs was clear that his stance on taxes was not based upon greed, but rather on principle, and that people like him that fight the Government on this topic often get punished.

The defense did not call any other witnesses and rested.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE WHETHER AND TO WHAT EXTENT *KAWASHIMA v. HOLDER*, 565 U.S. 478 (2012) IMPACTS THE GOVERNMENT'S BURDEN TO PROVE TAX EVASION CASES WHERE THE SUBJECT FINANCIAL TRANSACTIONS OF THE ACCUSED WERE NOT HIDDEN OR CONCEALED BY HIM.

Here, Stubbs attacks his convictions for tax evasion on Counts I and II. As the Tenth Circuit noted, the burden of the Government was more than showing that Stubbs passively failed to file his

tax returns; rather, the Government was required to prove an affirmative act constituting evasion or attempted evasion. *United States v. Stubbs*, *slip op.* 10 (*citing United States v. Hoskins*, 654 F.3d 1086, 1090-901 (10th Cir. 2011)).

As to Count I, the jury found two acts of evasion: 1) issuing and causing to be issued payments to third parties for personal expenses from bank accounts he controlled which were held under the names of businesses; and 2) falsely instructing a vendor that payments to defendant's business National Rebate fund, Inc., were not income and did not need to be reported to the IRS, in response to a vendor's request for his Tax Identification Number (TIN).

As to Count II, the jury also found two acts of evasion: 1) issuing and causing to be issued payments to third parties for personal expenses from bank accounts he controlled which were held under the names of businesses; and 2) purchasing coins and other metals, on at least three separate occasions, with a total cost of more than $370,000.00 to conceal and disguise his unreported income and his ownership and control of said assets.

26 U.S.C. § 7201 requires intent to evade and defeat payment of tax owed, although this Court has held the elements of tax evasion under § 7201 do not necessarily involve fraud or deceit. *See Kawashima v. Holder*, 565 U.S. 478, 488 (2012).

As Stubbs pointed out in his own closing argument, all of his financial transactions and dealings were transparent and above-board. The Government's own evidence bears this out. When IRS Agent Gurgel asked Golden for the hard drive for the server, he simply handed it over when asked. All of the bank records were easily accessed by the Government, and Stubbs did not object to any of them.

The purchase by Stubbs of precious metals, as well as his property in Hawaii, was easily

substantiated because these records were easily obtained and produced by the Government from the banks. The centerpiece of the Government's "affirmative acts" evidence was the e-mail from Stubbs to Kool View regarding requests for tax documents (Kool View requested a TIN or Taxpayer Identification Number from Stubbs). As set forth, *supra*, Stubbs replied:

> You have invoices and cancelled checks as proof of payment of the marketing/advertising expense paid to our corporation. You will have a valid write-off of these invoiced expenses just like you do for your insurances, radio and print ads printing of marketing materials, et cetera. You do not need a TIN on our company, nor to report amounts paid to us as "income." The premiums collected by us are not our income and it is not proper to report it as such.

However, in context, this seems innocuous. As Stubbs explained during his closing argument, he dealt with hundreds of dealers in addition to Kool View. This one isolated incident cannot support evasion beyond a reasonable doubt. The e-mail is an embodiment of the view of Stubbs about taxes and income, not a command to Kool View to accept it.

He also explained during his closing argument that his payments for precious metals was a hedge against declining housing markets, not hidden in any way because he paid with a clear paper trail through his bank account. There was a paper trail and no attempt to conceal these transactions.

This is especially so in light of the Government's explanation of the dynamics of how "S-Corps" work in that money flows through the corporate entity to the owner (Stubbs was the sole shareholder and owner of NRF), which to a layman like Stubbs seems logical that it is all basically his money so he could use the corporate funds on occasion in this manner.

Moreover, Stubbs has not filed a tax return with the IRS since 1992. He did not decide to start evading in 2005. Stubbs admitted that he had not paid taxes or filed his returns, but there was no evidence presented that he did anything more than that failure to pay and file.

The defense theory at trial was that there was no willful or intentional evasion. The Government failed to prove that the purchase of precious metals and the Kool View e-mail constituted affirmative acts of evasion sufficient to satisfy the Government's burden of proof under the standard of *Jackson v. Virginia*, 443 U.S. 307, 314-18 (1979) (sufficiency of evidence at trial is whether, after reviewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt).

The Government showed that Stubbs failed to file. It did not prove sufficiently that he took affirmative steps to evade. This Court should decide whether the facts are sufficient to sustain the Government's burden of proof.

II.

THIS COURT SHOULD DECIDE WHETHER THE GOVERNMENT'S PROOF OF "SOPHISTICATED MEANS" AS A SENTENCE ENHANCEMENT IS SUSTAINABLE WHEN THE ACCUSED MAKES NO EFFORT TO HIDE OR CONCEAL HIS FINANCIAL RECORDS.

In this case, the Government alleged, and the district court found, a two-level enhancement was warranted under Guidelines § 2T1.1(b)(2) for sophisticated means "based on the defendant's concealment of proceeds in gold and silver coins, his use of business bank accounts to pay personal expenses and conceal income, and his efforts to prevent vendors from sending NRF income information from being transmitted to the IRS."

Stubbs objected to this enhancement on the basis that his operation was simple and straightforward, and that he did not hide or conceal any of his financial transactions or assets. Sent. Tr. 20-22 ("defendant objects and indicates that he did not use sophisticated means; that his

transactions were transparent and open, they were recorded in QuickBooks and in the bank records."); Doc. 225 at 2 ("An enhancement for sophisticated means is not applicable").

As Stubbs pointed out at sentencing, "sophisticated means" under the Guidelines means "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense" and includes "[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts." *See* Application Note 5 to Guidelines § 2T1.1); *see also United States v. Stegman*, 873 F.3d 1215, 1237-40 (10th Cir. 2017) (quoting Guidelines).

According to Stubbs, he denied engaging in any type of complex or intricate actions, described is purchase of gold and silver as hedging, and noted that all of his income was properly recorded on QuickBooks, and deposited in the bank. He also distinguished his conduct from that found in other cases in the Tenth Circuit. The district court rejected his view and applied the two-level enhancement.

The district court erred in applying this enhancement.

As Stubbs pointed out below, when one reads through the trial transcript in this case, one is struck by how unsophisticated Stubbs operated. Nothing was concealed or hidden, all of his financial activities were documented by bank records, wire transfers, or his own business records in QuickBooks.

Further, this was a simple failure to pay/file case that did not involve any allegations of tax fraud or money laundering. The evidence showed that Stubbs failed to pay and file tax returns, not that he attempted or did hide or conceal any income. This is what separates his case from other cases where sophisticated means were found by the lower courts.

For example, in *Stegman*, the Tenth Circuit found sophisticated means where the defendant created multiple LLCs to hide her activities and to disguise information when it served her purposes, used money orders to conceal income, utilized employees to make money order purchases to conceal income, and "engaged in...a...time-consuming enterprise to essentially launder the money that she skimmed from [Midwest] through money orders in very small amounts." *Id*. 1239-40; *see also United States v. Vernon*, 814 F.3d 1091, 1107 (10th Cir. 2016) (use of sham corporation constituted sophisticated means).

As the Guidelines Application Note 5 illustrates, this enhancement is geared toward defendants who engage in conduct *designed to hide assets or transactions*, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts–none of which Stubbs did.

This Court should grant review in order to determine the reach and scope of this enhancement in cases like this one where the Government presented no evidence that Stubbs hid or concealed any assets or financial transactions.

III.

THIS COURT SHOULD DECIDE WHETHER THE GOVERNMENT MAY ENHANCE A SENTENCE FOR "CRIMINAL ACTIVITY" BY USING ALLEGATIONS OF CIVIL FRAUD.

The Government sought an additional enhancement based upon a failure to report income exceeding $10,000.00 from *criminal activity* pursuant to Guidelines § 2T1.1(b)(1). This section of the Guidelines states: "If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels." According to Application Note 4, "Criminal Activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.

The gist of the Government's complaint at sentencing was that the State of Wisconsin had filed a *civil* enforcement action against Stubbs and his company NRF relating to "the fraudulent rebate scheme" and had obtained a civil judgment; and further, that the Colorado Attorney General had received 627 consumer complaints regarding NRF, and similarly obtained a civil judgment.

Stubbs objected to this enhancement on the basis that he was never charged with any *criminal* conduct by either Colorado or Wisconsin, that these civil sanctions were for misleading or deceptive business practices, not fraud or criminal conduct.

At the sentencing hearing, Stubbs explained that he allowed Colorado to have their civil judgment, "But I don't believe that the National Rebate Fund business is a criminal enterprise." Stubbs recognized that the rebate industry "is something that maybe a lot of attorneys general may not care for, may be similar to multi-level marketing programs, maybe it doesn't have the best reputation."

However, Stubbs sought legal advice before he established the company in Utah, before moving it to Colorado; and in fact cooperated with investigations from other states, none of which filed criminal charges.

As to the civil actions, Stubbs explained that he was basically "being outspent by the Government" and simply allowed the civil judgment because damage to the company had already been done, "But I don't believe that the National Rebate Fund business is a criminal enterprise." Stubbs pointed out that NRF did not profit from denied claims, and that the money remained in escrow to pay valid claims.

The district court applied the enhancement over the objection of Stubbs, concluding that the trial evidence showed fraud by Stubbs and the NRF. This conclusion is incorrect.

It is important to understand how the NRF rebate program worked, as described at trial by Linda McElhaney and Susan Duran. There is nothing fraudulent about it. It is a simple concept operating on the fact that a large number of people will not follow simple instructions four years after purchasing windows or siding in order to get the rebate (called "slippage").

There was no testimony or allegation at trial or at the sentencing hearing that any customer who correctly followed the rebate instructions was not paid; and there was in fact an independent person processing the claims–Susan Duran. The only testimony at trial concerning this came from Duran herself, who testified that the final decision regarding claims was hers, not Stubbs.

Of course, the fact that some people complained about the rebates and these complaints caught the attention of state Attorneys General does not transform the rebate program into a criminal offense. There is no fraud, and the district court was not able to point to any actual fraud committed by Stubbs. He just did not pay his taxes or file returns like he should have. *See, e.g.*, *United States v. Hoskins*, 654 F.3d 1086 (10th Cir. 2011) (escort service/prostitution qualified under this enhancement for criminal activity).

Importantly, the elements of civil fraud are different than that of criminal fraud that would support the enhancement here. Under Wisconsin law, civil fraud or deceptive practices has three elements: 1) the defendant made a representation to "the public" with the intent to induce an obligation; 2) the representation was "untrue, deceptive or misleading"; and 3) the representation materially caused a pecuniary loss to the plaintiff. *See Novell v. Migliaccio*, 2008 WI 44, ¶ 49, 749 N.W. 2d 544, 553.

In contrast, criminal fraud typically has a scienter requirement or some kind of intent to defraud. *See*, *e.g.*, *United States v. Profit*, 49 F.3d 404, 406 n.1 (8th Cir. 1995) (outlining the

elements of wire fraud, which involves voluntary and intentional participation in a scheme to defraud another out of money, with specific intent to defraud).

Comparing these two very different legal concepts is problematic for the Government in the opinion of Stubbs because they are not comparable. There is good reason for this, namely the much harsher penalties available to the Government against the accused in the criminal law arena.

Thus, the Government was able to parlay conduct involving civil claims against Stubbs with no evidence that any aspect of the rebate program was misrepresented or fraudulent, into a sentencing enhancement designed to punish criminal activity.

This Court should grant review of this claim in order to determine whether the "criminal activity" enhancement should be limited to true criminal conduct.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DATED this 24th day of May, 2019.

Respectfully submitted,

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