19-95

No.

In The

SUPREME COURT OF THE UNITED STATES

LINDA BOLTON ET AL.,
Petitioner (s),

v.

UNITED STATES OF AMERICA,
Respondent (s).

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LINDA BOLTON
920 South 34th Avenue
Hattiesburg, MS 39402
Petitioner, Pro Se

CHARLES BOLTON
C/O Linda Bolton
920 South 34th Avenue
Hattiesburg, MS 39402-
Petitioner, Pro Se

July 15, 2019

QUESTION(S) PRESENTED

1. Whether tax prosecutions can be now be authorized by the Commissioner of the Internal Revenue Service for investigation by a grand jury and approved for prosecution instead of the Department of Justice as required by statute, creating a new and dangerous legal precedence, resulting in convictions and sentences including orders for terms of imprisonment in this case, that are neither supported by statute or prevailing case law?

2. Whether the convictions in this case, which are based on perjured witness testimony, can stand when that perjured testimony is directly related to suppression of evidence by the Government in violation of *Maryland vs. Brady*, and this court's ruling in *Napue v. Illinois*, 360 U.S. 264 (1959), and that would allow a criminal defendant to be convicted based on perjury that the prosecution fails to correct, and in violation of the Petitioners constitutional rights to due process under the Fifth and Fourteenth Amendments of the Constitution?

3. Whether the District Court can develop its own elements for tax evasion by mixing elements from multiple circuits which changes the required statutory elements and does not mirror Fifth Circuit elements for tax evasion just for Petitioner's case and bias Petitioners case by using different legal standards than other Petitioners in the Fifth Circuit violating

Petitioners' rights to due Process under the Fifth and Fourteenth Amendments of the Constitution, and impacting tax evasion judicial proceedings for all circuits; and whether a conviction for Section 7206 (1) can stand when the government omitted a required statutory element for conviction from indictment and trial by omitting a "materiality" element, resulting in guilty jury verdict, and that the Fifth Circuit omitted from its opinion since the government omitted it, and violating Petitioners' Fifth and Fourteenth Amendments of the Constitution and creating a new and dangerous legal precedence for Section 7206 (1) cases?

LIST OF PARTIES

Charles Bolton, Petitioner, Pro Se

Linda Bolton, Petitioner, Pro Se

Petitioners were defendants-appellants below.

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

LIST OF PROCEEDINGS BELOW

1) United States District Court for the Southern District of Mississippi, Eastern Division
William M. Colmer Federal Building & United States Courthouse
701 North Main Street, Suite 200
Hattiesburg, MS 39401

United States of America v. Charles and Linda Bolton
Case Type Criminal:
Case Number: 2:16-cr-00007-KS-MTP

Final Judgment Issued on March 28, 2017

2) U.S. Court of Appeals For The Fifth Circuit
600 Camp Street
New Orleans, LA 70130
Clerk's Office:
U.S. Court of Appeals For The Fifth Circuit
600 S. Maestri Place

Suite 115
New Orleans, LA 7013

United States of America v. Charles and Linda Bolton
Case Type Criminal:

Case Number: No. 17-60502 consolidated with 17-60576

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pro Se Linda Bolton and Charles Bolton (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment to the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The Fifth Circuit Court of Appeal opinions subject to this petition are provided at (Appendix ("App.") 1a to 196a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment states in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ...."

The Sixth Amendment states in relevant part that "In all criminal prosecutions, the accused shall enjoy the right ....trial, ...**to be informed of the nature and cause of the accusations**, to **be confronted with the witnesses against him**,...and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment states in relevant part that "no state shall make or enforce any law nor

shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

This Court has repeatedly reaffirmed "that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process." *White v. Ragen*, 324 U.S. 760, 764 (1945). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). When the prosecutor fails to fulfill his "duty to correct what he knows to be false and elicit the truth," he "prevent[s] ... a trial that could in any real sense be termed fair." *Id.* at 270. *(See also United States v.Agurs*, 427 U.S. 97, 103 (1976) ("In a series of . . . cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair.").

This court has further ruled that:

"[A] conviction obtained by the knowing use of false testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *United States v. Bagley*, 473 U.S. (1985) at 679 n.9 (citing *Napue*).

In this case, a key prosecution witness offered false testimony critical to the conviction of petitioners. The perjurious witness testimony in this case was not only on based on hearsay–out-of-court statements that went to the truth of the matter in

order to obtain convictions in this case; but it was also based on suppression of an FBI 302 Report by the government in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that contained impeachment and exculpatory evidence that went to the heart of the guilt or innocence of Petitioners; and that was later confirmed through a secret plea deal **(App M)** that also suppressed by the government in violation of *Brady,* and that was placed under seal by the district court of wealthy and affluent attorney, who was the initial target of the Internal Revenue Investigation, and whose plea of guilty for tax fraud was based on the same evidence the government alleged at trial was fraud by the Petitioners.

Under normal circumstances, "[a] new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ....'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271). However, because the prejurious testimony by the government's witness also included a violation of *Brady* based on the suppression of key evidence critical to the guilt or innocence of petitioners, combined with violations of the petitioners' due process rights under the sixth amendment of the constitution based on hearsay evidence, the reversal of convictions of Petitioners in this case is warranted.

Statutory Provisions

Title 26, U.S.C. §7201 - Attempting to Evade Assessment for Tax years 2009-2013.

The Government Charged the Petitioners with violating Title 26, U.S.C. §7201.

The record in this case documents that the government did not provide any affirmative acts that would support a conviction for tax evasion in this case, because the indictment included a tax evasion charge that rewritten to include elements of offenses from three separate statutes under Title 26 7201, 7206 (1), and 7207. This illegal and hybrid offense charged in the indictment permeated the entire prosecution from the beginning to the end, and resulted in convictions unsupported by neither the Statute nor established law.

Title 26, U.S.C. §7206 (1) - Filing of a False Tax Return for Tax years 2009-2013.
The Government also charged the Petitioners with the offense of Filing of a False Tax Return. **This resulted in a pyramid or stacking of charges because filing of a false tax return was charged as lessor included offense of tax evasion resulting in duplicate charges.** Congress, in fixing varying penalties for offenses of attempting to evade federal income tax and for willfully making and subscribing a tax return not believed to be correct, did not intend to pyramid penalties and authorize a separate penalty for a lesser included offense, which arose out of the same transaction and which would be established by proof of guilt of the greater offense of attempting to evade income tax. *United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), cert. denied, 396 U.S. 841 (1969). See also, *United States v. Dale,* 991 F.2d 819, 858-59 (D.C. Cir. 1993); *United States v. Kaiser*, 893

F.2d 1300, 1307 (11th Cir. 1990); *United States v. Citron*, 783 F.2d 307, 312-14 (2d Cir. 1986).

STATEMENT OF THE CASE

I. Introduction

A. This is an extraordinary case. One that not only shocks the conscience, but demonstrates how any ordinary citizen may find him or herself in the cross-hairs of an unconstitutional criminal prosecution. Petitioner Charles Bolton and his wife are African American small business owners and who became selective targets of criminal investigations and prosecutions following their support for an African American Candidate for Mayor in the city Hattiesburg, Mississippi. Petitioner Charles Bolton was a career 40-year Law Enforcement Officer and public servant, and he and Petitioner Linda Bolton were committed servants to the poor and under-privileged community in which they lived. They had no criminal record nor had they ever been charged with a crime prior to this case.

The investigation and prosecution of petitioners occurred in the Southern District of Mississippi after the Attorney General of the United States issued a Department of Justice Memorandum that recused the entire office of the United States Attorney for the Southern District of Mississippi, and its investigators from further investigation and prosecution of Petitioner Charles Bolton..

The Assistant General Counsel for Executive Office for the Assistant United States Attorney General

issued a written memorandum on July 29, 2015, that recused the entire Office of the Assistant United States Attorney and all investigators (federal and state) from the Southern District of Mississippi from the investigation and possible prosecution of Ms. Linda Bolton's husband (Charles Bolton). Failure to provide this evidence to the defense by the government, constitutes a major discovery violation under *Brady v. Maryland*, 373 U.S. 83 (1963).

The DOJ issued a Memorandum dated July 29, 2015 (**App J.**), memorializing their findings following an investigation based on a complaint filed a member of Congress on behalf of petitioner Bolton, that included the removal of the case from the Southern District of Mississippi and reassigning it to the Eastern District of Louisiana.

Instead of following the directives of the DOJ, the record documents that United States Attorney for the Southern District of Mississippi, continued the investigation of Petitioner Charles Bolton after his recusal, through a Grand Jury convened under Title 18 United States Code, in conjunction with IRS Agent Bradley Luker. These actions were without prior authorization by the DOJ Tax Division, as required by statute to investigate alleged tax violation which may be authorized under Title 26, U.S.C. The record reflects that the indictment returned in this case in March 22, 2016, was eight (8) months after DOJ issued the July 29, 2015, memorandum based on an investigation by IRS Agent Luker and based on a grand jury convened in Mississippi and by the United States Attorney's office for the Southern District of Mississippi.

This DOJ Memorandum was suppressed by the government and not turned over during discovery before, during or after trial, and petitioners did not learn of it until April 2017, after their trial and tax convictions in this case, and after they were sentenced to terms of imprisonment. The Petitioners only learned of the memorandum through its release as a result a freedom of information request filed on their behalf by Counsel, Attorney Ivan Bates, with the DOJ following their September 2016, convictions. After receiving the DOJ Memorandum, the Petitioners promptly filed Motions for New Trial in the district court based on this new evidence, and requested their convictions and sentencings be vacated.

II. The Indictment

On March 22, 2016, Petitioners ("the Boltons") were named in a ten-count indictment in the Eastern Division of the Southern District of Mississippi. Counts 1-5 charged the Petitioners with Attempt to Evade or Defeat Tax in violation of 26 U.S.C. § 7201, in relation to the couple's tax filings in years 2009-2013. Counts 6 through 10 charged the Petitioners with Filing a False Tax Return in violation of 26 U.S.C. § 7206(1) regarding their tax filings for years 2009-2013.

Although a federal grand jury is empowered to investigate both tax and non-tax violations of federal criminal laws, the **Tax Division must first approve and authorize** the United States Attorney's Office's

use of a grand jury to investigate criminal tax violations (28 C.F.R. § 0.70) (**App L**).

This process was not followed in this case. Instead, IRS Agent Luker led a tax grand jury investigation of Petitioners under Title 18, U.S.C. in the Southern District of Mississippi without authorization of the Tax Division in conjunction with the Office of the United States Attorney's Office for the Southern District of Mississippi after that office had been recused from further investigation and prosecution of Petitioner Charles Bolton (**App J**). The Assistant United Attorney for the Eastern District to Louisiana stated on the record that IRS Agent Luker had tried but failed to obtain Department of Justice Tax Division Approval.

He further stated:

> And I was shocked that I had not been contacted by anyone in connection with that matter.
> THE COURT: The food theft case?
> MR. HARPER: No, about the tax case. I hadn't --
> Judge, I had done nothing on the food theft case. I bored in on the tax case, and the information that **Mr. Luker gave me** about the tax case, and **pressed the tax division**, which can be difficult to deal with in Washington, about approving the tax case, and I obtained that approval, mainly because Bradley Luker had already been -- **advanced the ball way down the field on that matter,**

> and, and still heard from no one on – about the tax case. And **there were subpoenas and things like that that had been issued**, and, well, you know, I can't talk about that, the recipient of a federal subpoena can talk about it all day. And I was just surprised. So we went in, indicted the case.

The subpoenas referenced by AUSA Harper as having been executed by IRS Agent Luker were never produced to Petitioners in discovery, and it is unknown by what entity or who authorized the subpoenas or for what purpose.

The Department of Justice Tax Division is the only governmental entity authorized by statute to approve Criminal proceedings arising under the internal revenue laws, (28 C.F.R. § 0.70). In this case, evidence in the record documents that the investigation and prosecution of Petitioners were not consistent with the legal procedural requirements as outlined in the statute governing tax prosecutions, and it did not follow the directive of the DOJ statutes. The unraveling of the questionable process of the investigation began following a Department of Justice inquiry by the Attorney General of the United States in early 2015.

Before a United States Attorney's Office may file any information or seek the return of an indictment on matters arising under the internal revenue laws in an expanded investigation, the Tax Division must <u>first authorize</u> the specific tax charges **(App. L)**. The record is devoid of any documentation that proper

procedures were followed to gain approval for a tax prosecution of petitioners in this case.

The Government's Indictments Against the Boltons Have Multiple Statutory Errors Creating Glaring Incongruities:

The government cannot reconcile its arbitrary merging of multiple elements from different statutory tax offenses into its tax evasion counts under Title 26 U.S.C. §7201, in the Boltons' indictments. The government combined elements of multiple statutory offenses, §7206 (1) and §7206 (2) into its tax evasion counts under 26 U.S.C. §7201 resulting in an unconstitutional and non-statutory offense.

The government inserted "preparation" and other language from an element of 7206 (2) which states:

> Defendant aided or assisted in procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the internal revenue laws.
>
> **This is not a statutory element of tax evasion. (See App**

The government also inserted language stating "signing" a false and fraudulent tax return and other language from an element of Title 26 U.S.C. §7206 (1) as follows:

> The making and signing of a return, statement or other document containing a written declaration that it was signed under the penalties of perjury.

The Boltons were not charged in the indictment under Title 26 U.S.C. §7206 (2), and there was no co-conspirator or other defendant. Inclusion of §7206 (2) language regarding preparation of returns and §7206 (1) language of signing a false return in the Boltons' indictments under tax evasion §7201 creates a non-existent hybrid tax evasion statute (with non-existing statutory offense) with incongruent tax crime elements and offenses and constitutes plain error. Mixing elements of competing incongruent tax statutes under tax evasion renders the indictment insufficient. A Section 7206 (2) prosecution differs from a Section 7206 (1) prosecution because one of the required elements of a §7206 (1) violation is subscribing (signing) any return statement or other document under penalties of perjury, but this element is not material to a §7206 (2) prosecution. The government amended the required elements for tax evasion in the Boltons' indictments **to include two new elements, signing of a false return under the penalties of perjury** and **preparation or assist in preparation of a false return. This resulted in the Boltons being convicted of non-existing hybrid tax offenses** outside of the tax evasion statute, duplicity of charges and associated convictions and sentences for the Boltons.

The indictment in this case fails, as the elements were not charged with particularity and did not

apprise the Boltons' of what they were being charged with specificity or found guilty of.

The sufficiency of an indictment is measured by whether (1) each count contains all essential elements of the offense charged, (2) the elements are charged with particularity, and (3) the charge is specific enough to preclude a subsequent prosecution on the same offense. *United States v. Threadgill*, 172 F.3d 357, 366 (5th Cir.1999).

The canon against surplusage is not a mechanical rule, but this Court has repeatedly held the canon has its greatest force where a given interpretation would undercut another provision in the "same statutory scheme." *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (rejecting interpretation "which renders superfluous another portion of that same law"); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 & n.11 (1988) (same) (collecting authority). "The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that most intelligent drafters do not contradict themselves (in the absence of duress). Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, *Reading Law* 180 (2012). *Marinello v. United States of America*, 839 F.3d 209 (2018).

Materiality

The government omitted the second element of **materiality** under Section §7206 (1) from the Boltons' indictment, during trial, and failed to provide it to the jury for a determination. The Fifth Circuit opinion omitted this element: The inclusion in the document of information that was false as to a material matter.

Section 7206(1) proscribes filing a federal tax return which the taxpayer "does not believe to be true and correct **as to every material matter**." Because materiality is an element of a § 7206(1) offense, see *United States v. Samara*, 643 F.2d 701, 703 (10th Cir. 1981)(§ 7206(1) requires proof of a false statement, willfully made, **of a material matter**), Petitioners had the right to have the jury decide materiality. As this court instructed in *United States v. Gaudin,* 515 U.S. at 511, 115 S. Ct. 2313 (1995):

> The Constitution gives a criminal defendant the right to demand that a jury find him **guilty of all the elements of the crime** with which he is charged; one of the elements in the present case is materiality; [defendant] therefore had a right to have the jury decide materiality.

After *Gaudin*, materiality is an issue to be determined by the jury. *Gaudin*, held that **it was error for a trial court to refuse to submit the question of materiality to the jury** in a prosecution under the first prong of 18 U.S.C. § 1001, overturning lower court cases holding that materiality was a legal question for the court.

The court has held that **if materiality is an element of the offense**, that element must be submitted to the jury, and the jury must find materiality beyond a reasonable doubt to convict. *Gaudin* applies to 26 U.S.C. § 7206 (false statements on a tax return).

Specifically, the Court stated that "[t]he most common formulation of that understanding is that **a concealment or misrepresentation** is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." 485 U.S. at 770 (citations and internal quotation marks omitted).

To establish materiality as an element, it is sufficient that the statement have the capacity or a natural tendency to influence the determination required to be made. *See Id.*; *United States v. Lueben*, 838 F.2d 751, 754 (5th Cir. 1988); *United States v. Allen*, 892 F.2d 66, 67 (10th Cir. 1989). One often cited test for materiality appears in *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956):

> "Material" when used in respect to evidence is often confused with "relevant," but the two terms have wholly different meanings. To be "relevant" means to relate to the issue. To be "material" means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material.

Because the district court did not require the jury to make a finding on an essential element of the case, vacatur of the petitioners' filing of a false tax return and their evasion tax convictions, respective sentences filing of a false return is a lessor charge of the offense of the tax evasion convictions. The Fifth Circuit was also required to vacate restitution orders against Petitioners Charles and Linda Bolton, which were premised on their filing of false returns and on tax their evasion convictions.

The Boltons' indictments are legally insufficient and fails under *Threadgill* and violates the Boltons' Sixth Amendment rights to be informed of the nature and cause of the accusations against them.

Unless it was proven that the Boltons' violated the required statutory elements of offenses under 26 U.S.C. §7201 and §7206 (1) their convictions must be overturned. *United States v. McGhee*, 488 F.2d 781, 784-85 (5th Cir.1974).

III. The Trial Proceedings

There are significant irregularities concerning IRS Agent Luker's role in the investigation and prosecution of petitioners. The record documents he was the IRS Agent involved in the investigation of the Petitioners including issuance of subpoenas. Further, he did not disclose the investigation to the Eastern District of Louisiana of petitioners after the United Attorney for the Southern District of Mississippi was recused by DOJ. IRS Agent Luker authored a Special Agent Report that recommended the indictment of the petitioners without first

conducting an interview with them regarding the IRS investigation. Petitioners only learned of any issues with their tax returns after they were indicted on tax charges.

IRS Agent Luker also served a summary witness for the government at trial, and he prepared summary charts detailing the alleged tax deficiencies petitioners were subject to for tax year 2009 -2013. The information contained in the charts included computations IRS Luker prepared, based on out-of-court statements of Attorney John Lee made during an FBI investigation that the checks written to their businesses were for "food and liquor", and that were later presented to the jury and provided to them for use in their deliberations. IRS Agent Luker **testified as to the truth of the matter regarding the Lee checks**, substituting his own knowledge for that of Lee's. IRS Agent Luker's hearsay testimony, over the objections of petitioners' trial counsel, constituted a violation of the petitioners' rights under the confrontation clause which states that:

The Confrontation Clause provides, in pertinent part:

"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

The confrontation clause guarantees criminal defendants the opportunity to face the prosecution's witnesses (such as John Lee) in the case against them, and dispute the witnesses' testimony. This guarantee applies to both statements made in court

and statements made outside of court that are offered as evidence during trial. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The Confrontation Clause bars the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 68. . Further, there is no evidence John Lee was unavailable based on criteria prescribed as exceptions under Rule 804(a). " Fed. R. Evid.

IV. Willfulness/Jury Instructions Provided by the District Court were erroneous.

The petitioners briefed the Fifth Circuit that the jury instructions provided to the jury were erroneous **as to willfulness**. The District Court abused its discretion when it gave an incorrect instruction for "willfull" to the jury and refused to answer the jurors questions about "willfull" and "unwillfull."

The District Court committed reversiable error in reading the Fifth Circuit's Pattern Jury Instructions 2.101 for the Substantive Charge of Tax Evasion, 26 U.S.C §7201 by instructing the jury as follows:

The word **willfully** as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is to say, either to **obey** or disregard the law **The instruction given by the judge is an incorrect statement of the law**, and incorrectly instructed jurors as to the principles of law applicable to the

factual issues confronting them and the resulting "guilty verdicts" cannot be sustained based on the "beyond a reasonable doubt" standard.

The court ruled in *Cheek v. United States* 498 U.S. 202, 111 S. Ct. 604 reasoned that the government cannot carry its burden to prove willfulness in a criminal tax prosecution if the jury believes that the defendant, in good faith, did not understand the law. That is true regardless of "however unreasonable a court might deem such a belief." *Id.; see also United States v. Simkanin,* 420 F.3d 397, 410 (5th Cir. 2005).

The district court's jury instructions regarding willful in this case created confusion for the jury and resulted in the jury sending a question to the court for further clarification of its definition. It is clear from their question that the jurors were confused by the instructions regarding willful. The district court's **jury charge for willful did not comport with *Cheek* because of the error in the statement of the law** and because it did not advise the jury that a defendant's good faith misunderstanding of tax law may be "objectively unreasonable". This error was not corrected by the court orally and the written instruction did not cure the error as the district court changed the standard in *Cheeks* to state **erroneous** instead of **objectively unreasonable** in its written Instruction #17 that it provided to the jury.

The jury posed the following jury question to the court requesting clarification of the court's instruction regarding willful:

> **THE COURT**: "Can you give a clarification on **willfully** and **unwillfully** attempt to evade?" The court refused to re-read Instruction #17. Defense counsel objected. The jurors did not understand willful and good faith as they mentioned "unwillfully."

The court did not answer the jurors question and stated he would ask jurors to re-read Instructions 13, 14, 15. Clarification of the definition of willful was warranted since the district court's reading of the willful jury charge to the jury before deliberations did not comport with *Cheek* and statement of law, as it did not advise the jury that a defendant's good faith misunderstanding of tax law may be "**objectively unreasonable**."

District Court Errors in Reading Basic Elements of Tax Evasion

The District Court **abused its discretion by pre-drafting and then reading to the jury its own newly created quasi-elements for tax evasion it developed just for the Boltons' case**. These instructions deviated from the Fifth Circuit Patterned Instructions. The court presented it to the jury as required elements for tax evasion which did not mirror the Fifth Circuit pattern jury instructions.

The court arbitrarily selected and **combined paragraphs** which appeared to be the most punitive language **from Fifth Circuit Pattern Jury instructions with language of Sixth Circuit Pattern**

Jury Instructions and read them to the jury as Fifth Circuit required elements for tax evasion just for the Boltons' case. **Having jumbled together arbitrary sections of required elements for tax evasion from multiple circuits**, the judge read them to the jury shortly before jury deliberations as required elements for tax evasion for a Fifth Circuit case, the District Court **created a different standard of required elements for tax evasion** that the Boltons were subjected to which were distinctly different from what other tax case defendants in the Fifth Circuit were subject to. This error biased the Boltons and their **due process rights** to a fair trial.

The District Court Judge combined Sixth Circuit Pattern Jury instructions under 5.01 Attempt-Basic Elements with the Fifth Circuit Pattern Jury Instructions under 2.101 Basic Elements and read the combined instructions to the jury as required elements for a conviction for tax evasion:

> For you to find the defendants guilty of attempting to commit tax violation, you must be convinced that the government has proved each of the following beyond a reasonable doubt. First, that the defendants intended to commit tax evasion for the years 2009 through 2013; and, second, that the defendants did an act that constitutes a substantial step towards the commission of a crime and that strongly corroborates the defendants' criminal intent and amounts to more than mere

participation.

The Judge purposefully **did not read** the last paragraph for Sixth Circuit Pattern Jury instruction which states:

> (2) If you are convinced that the government has proved both of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about either one of these elements, then you must find the defendant not guilty.

The District Court made no attempts to take corrective action before the jury began and completed deliberations. The trial judge's failure to immediately explain and correct errors contributed to a finding of guilt by the jury. **These errors violated the Boltons due process rights to a fair trial guaranteed under the Fifth and Fourteenth Amendments** and failed the public judiciary's interest in ensuring that criminal trials are conducted within the ethical standards of the profession, and that legal proceedings appear fair to all who observe them. *Wheat v. United States*, 486 U.S. 153, 160 (1988).

The **errors in the Boltons' indictment combined with errors in the Jury Verdict Form** (failure to state the elements of the offense per count, failure to state affirmative acts charged per count, and failure to state the amount of the tax deficiency per count) **and errors in the Fifth Circuit Pattern jury instructions on key elements of §7201 were amplified** by the

Government's argument to the jury which **included non-charged offenses**, errors in the indictment and jury instructions. *United States v. Chagra*, 807 F.2d 398, 402 (5th Cir. 1986).

A jury instruction must: (1) correctly state the law, (2) clearly instruct the jurors, and (3) be factually supportable. *United States v. Phea*, 755 F.3d 255, 266 (5th Cir. 2014). "[S]pecific jury instructions are to be judged not in isolation, 'but must be considered in the context of the instructions as a whole and the trial record." *Id.*

The jury **verdict form in this case did not conform to law**, and it **did not state the elements of the offenses**, provide the affirmative acts and the tax deficiency amounts for each count, therefore, it is unclear what the jury convicted the Boltons of. Jury verdict forms are considered part of the jury instruction and has a combined effect on the jury. *Jones v. United States*, 527 U.S. 373, 393 (1999). *See also United States v. Cardinas Garcia*, 596 F.3d 788, 799 (10th Cir. 2010). (When reviewing a jury verdict form, we must determine whether it, along with the instructions read to the jury, as a whole adequately stated the applicable law).

The trial judge never told the jury to indicate which of the criminal acts under §7201 and §7206(1) supported its verdict and **allowed the jury to just mark an X next to Guilty on the Jury Verdict Form**. Further, the Boltons' final verdicts are questionable as the trial judge committed another judicial error after the jury told the court it had reached a verdict and was called back into the courtroom. The trial

judge directed the jury to "complete" the verdict form after informing the jury that something was missing. *United States v. Jose Latorre-Cacho*, 874 F.3d 299 (1st Cir. 2017). The court in *Latorre-Cacho* concluded that Latorre's challenge to the jury instructions had merit and vacated his conviction when the trial judge committed this same error. Although fully briefed by Petitioners, The **Fifth Circuit failed to render an opinion on erroneous jury instructions and jury verdict form.**

V. The Government's Evidence Did Not Prove Beyond a Reasonable Doubt An Affirmative Act of Commission Constituting An Attempt to Evade Taxes Or Willfully File a False Return

The Boltons did not willfully commit tax evasion of assessment and did not willfully file false tax returns. Each element must be proved beyond a reasonable doubt. *United States v. Marashi*, 913 F.2d 724, 735-36 (9th Cir. 1990); *United States v. Williams*, 875 F.2d 846, 849 (11th Cir.1989).

The Boltons never received a notice of tax deficiency. The government **did not dispute and the Fifth Circuit did not address**, the crucial fact that the Boltons never received a notice of tax deficiency as required by law before a criminal prosecution can ensue. *See* Title 26 U.S.C., §6212; *Perez v. United States*, 312 F.3d 191, 196 (5th Cir. 2002); *Scar v. Commissioner*, 814 F.2d 1363, 1366 (9th Cir. 1987). **This is a fundamental due process concern** and the Boltons have been prejudiced as a result. Properly noticed, the Boltons could have made all attempts to remedy the problem before criminal liability ensued.

The Boltons' 2009 return was amended and the 2010 return was amended, settled and closed and the government re-opened the closed books for this year without notice to the Boltons as required under tax statutes and charged him criminally for evading assessment of tax for these years.

The Boltons' argued *United States v. Adams*, 314 Fed. Appx. 633 (5th Cir. 2009) applies as the charged offense in their indictments under section, §7206(1) refers to a tax form 1040, **not amended form 1040X** and states "(a) Charles and Linda Bolton's joint United States Individual income Tax Return, Form 1040 reported on line 22, in each of the years noted below, a total amount of income."

In *Adams*, the government is required to prove what is stated in the Indictment. For the Boltons' amended returns, they were not required to submit Form 1040 or Schedule C with amended return 1040X and there is no line 22 on 1040X forms, therefore; the government's charging language in the Boltons' indictments as affirmative acts for not reporting a correct amount on line 22 of form 1040 does not apply or comport with the Boltons amended returns Forms 1040X. Further, there is no signing under the penalty of perjury jurat on amended 1040X forms. The Boltons' indictments are legally insufficient and the Boltons should not have been charged criminally for alleged offenses as the government did not prove affirmative acts stated in the indictments. The government assured the Fifth Circuit in *Adams* that it would only prosecute an amended return if the amended return itself was

materially false. The amended returns were not materially false. The amended returns proved the Boltons made good faith attempts to amend their taxes and negate willful intent. *Cheeks v United States*. In addition, the jurat on the 1040X form did not comport with the perjury language in Form 1040, or the language in the Government's indictment and therefore, the Government did not meet its burden to prove its charged offenses in its Indictments.

There is no evidence that the Boltons signed a false return. One of the principal elements for conviction under 26 U.S.C. §7206 (1) is that the defendant "made and signed a false return." *United States v. Bishop*, 264 F.3d 535, 552 (5th Cir. 2001). There is no evidence, and the government conceded the Boltons did not sign returns. Without satisfaction of this element, the Boltons' convictions under, §7206 (1) cannot stand. See *Garner v. Louisiana*, 368 U.S. 157, 164 (1961) (reversal required where there was no evidence of essential element). The Fifth Circuit panel decision did not address this argument.

John Lee Checks

The Government's argument in its brief that it would be able to meet its burden and there would still be enough evidence to convict the Boltons without the John Lee checks does not adhere to due process law as it is for a jury to decide and it does not comport with law established in *Burks v. United States* 633 F.3d 347 (5th Cir. 2011). With the Lee checks making up approximately 80% of the government's alleged tax deficiency and Lee pleading

guilty to filing of a false tax return under §7206(1) for false and fraudulent deductions associated with his tax returns for the same timeframe of the Boltons' indictments, it unravels the government's case and arguments made during trial. It disproves the government's main argument against the Boltons that there was no evidence which demonstrated the deductions of expenditures included in John Lee's ledgers and tax returns (same deductions the government stated were legitimate as to the Boltons) were fraudulent or not deductible.

Mr. Lee's plea was signed on June 12, 2017, after Petitioners were sentenced and began their terms of imprisonment. Prosecutor Harper signed the plea deal and was aware of this when he wrote his June 12, 2017 Opposition to Defendants' Motions for New Trial. The District Court was also aware since Mr. Lee's plea deal was placed under seal at the District Court.

The Government did not meet its burden of proof beyond a reasonable doubt that the John Lee checks were income to the Boltons as charged in the Indictment. *United States v. Stanfa*, 685 F.2d 85, 86-87 (3d Cir. 1982). *See also Jones v. Thomas*, 491 U.S. 376, 381 (1989).

Since there is no differentiated single affirmative act of only the John Lee checks as a single count in the Boltons' indictments and jury verdict forms, all of the counts should be vacated as all counts in the indictment and jury verdict form include the John Lee checks rolled into alleged deficiency totals with other affirmative acts in Counts 1 through Count 10.

This renders both the indictment and jury verdict form legally insufficient. The Government must prove the affirmative acts as stated in its indictment. *(See United States v. Adams)*.

The Government's secondary argument for remaining alleged tax deficiency amounts was that certain deposits marked as loans were income to the Boltons and that the deposits were marked as loans to avoid being recorded as revenue. The District Court's opinion denying the Boltons' Motions for Acquittal and New Trial that even without the Lee checks, the Boltons would have been convicted is in error. **This is for a jury to decide**. No case was presented to a grand jury or trial jury without the John Lee checks.

The District Court's opinion would require this Court to guess which affirmative act or what the jury found the Boltons guilty of based on the government's erroneous and legally insufficient indictments and jury verdict forms which rolled the Lee check totals into Counts 1 through 10 with Manheim, National Guard and Merchant check totals. Attempting to now separate the Lee checks out of counts formerly presented to the jury as bundled counts including the Lee checks post-trial would be tampering, *United States v. Fairley*, 880 F.3d 198 (5th Cir. 2018).

The Government's accounting methodology and formula for calculating its tax deficiency amounts also followed this pattern of inclusion of John Lee cashed and deposited checks, certain checks alleged to have been marked as loan, Manheim, National

Guard and other checks combined in deficiency totals. This was presented to the jury by the government in the form of summary charts and was **asserted as truth** during their arguments before the jury.

IRS Agent Luker testified and agreed that every monetary transaction that the government challenged with reference to National Guard and Manheim, First Data Merchant Services and other vendors of the Boltons were backed by a 1099 delivered by Ms. Bolton to their accountants, Nicholson & Company and thus, **he conceded there was no concealment** of these records. These are official documents that were also forwarded to the IRS by these companies and reported on the Boltons' tax return Schedule C by their tax preparer for the years 2009-2013. He further testified that the IRS would look at the 1099s to examine for gross income. He also stated that the Boltons'1099s **were not deceptive**. In Burks, this Court held that taxpayers, although they misstated their bases, "disclosed the nature of the items on their tax returns sufficient to notify the Commissioner of the item being reported."

The Fifth Circuit followed other circuits and this Court and found that 26 I.R.C. section 6501(e)(1)(A)(ii) creates a safe harbor for "omissions of amounts which, though not included in the gross income as stated in the tax return, are adequately disclosed such that the IRS has sufficient notice". **This is the case here**. The government **failed to prove** the deposits marked as loans and other vendor payments were not disclosed and provided to the IRS as they were included in the 2009-2013 1099s and on

Schedule Cs in the Boltons' tax returns, which Agent Luker testified was the case and he stated that **items marked as loans were used in the normal course of business for the Boltons' businesses** in his S.A.R. Report. The government knew money marked as loans were used in the normal course of business for the Boltons as stated in the S.A.R. Report and still charged the Boltons with tax evasion.

The Boltons should not have been criminally prosecuted as this met the 26 I.R.C. section 6501(e)(1)(A)(ii) requirement, Fifth Circuit law and this Court's law in *Burks.*

The Boltons' rights to due process and fair trial guaranteed under the Fifth and Fourteenth Amendments were violated and their convictions should be overturned as they could not have overcome the multiple errors by the government and the District Court in the Boltons' indictments, jury instructions, court proceedings, insufficiency of evidence and prosecutorial misconduct.

Although fully briefed by petitioners, the **Fifth Circuit failed to render an opinion on** sufficiency of evidence.

At the conclusion of trial, Petitioner Charles Bolton was found guilty on Counts 2-10, and Petitioner Linda Bolton was found guilty on Counts 6 through 10. The Boltons **were found not guilty on Count 1.** The jury could not reach a verdict on Counts 2-5 as to Petitioner Linda Bolton, and the Court declared a mistrial at to those counts.

Petitioner Linda Bolton was acquitted of tax evasion for 2009, and received no convictions for the remaining four (4) tax evasion Counts 2-5 due to a hung jury. Petitioner Charles Bolton was acquitted for tax evasion for Count 1 but found guilty of tax evasion for count 2-5.convicted of counts 1-5 Both Petitioners were tried together at the same trial on the same evidence.

VI. Sentencing Errors

Prior to sentencing, the district removed the written Objections to the PSRs from the docket filed by the petitioners. At sentencing the district court not only forced Petitioner Charles Bolton to proceed with terminated counsel against his wishes, he stated on the record that the petitioners failed to file any objections to the PRS and therefore, he was going to accept them as filed. This assertion was not true as to the facts. Petitioners did file objections to the report, and cited the **finding by the IRS Agent that he found no relevant conduct** in his investigation, and that items marked as loans, were used in the normal course of business and noted there were no record of any major purchases. **(App K)**. After petitioners reported to prison, the court entered an order to reinstate the Petitioners' Objections back to the docket **(App L)**.

Although the district court stated the PRS were accepted in their entirety, **the Probation officer provided a statement declaring that there was nothing in that office's investigation that would warrant an upward variance in sentences** in this case. **(App)**. The court deviated from both the USSG and the PRS and ordered an upward variance

for petitioner Charles Bolton. The district court also increased the amount increase the deficiency calculations from that included in the jury's verdict at trial, to increase the punishment for Petitioner Charles Bolton, violating petitioners' rights to due process, under the Fifth and Fourteenth Amendments of the Constitution.
The district court imposed a sentence of an **upward variance sentence greater than the maximum guidelines range for the offense of conviction** based on irrelevant factors in violation of rights to due process under the Fourteenth Amendment of the Constitution of the United States.

The Petitioners sentences are also illegal because a recently unsealed john Lee plea deal documents that John Lee has *pled guilty* to tax fraud for the same checks the government alleged was income to the Boltons, and that led to their illegal convictions, and sentence of imprisonment. When the petitioners learned of this on April 2, 2018, they filed a motion with the Fifth Circuit to with Fifth Circuit requesting that the record be supplemented to include it as part of the Record on Appeal in this case, given its relevancy to the issues being considered by this court regarding the direct appeal. The Appellant's Brief **did include arguments regarding suppression of the John Lee Plea Deal** in violation of *Brady* and refutes the Fifth Circuit's ruling that the Petitioners did not include the John Lee Plea deal in their appeal brief as the Court asserts in its opinion.

The John Lee Plea Deal was material because it directly supports Petitioners' innocence since the

plea confirms that the checks alleged to be income to the Boltons are the same checks that John has admitted was fraud as to his tax returns. Evidence is material under Brady "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The Fifth Circuit's Decision is Wrong.

The Fifth Circuit Opinion is inconsistent with the record in this case, uphold the district court's orders that violate established statutes and well established legal principles precedent set by this court.

VII. Opinion of the Fifth Circuit Regarding the District Court's Denial of the FBI 302 Report as Brady Material was erroneous.

A. October 18, 2018 Opinion.

The Fifth Circuit ruled erroneously in its October 18, 2018, Opinion that the district court did not err in denying the FBI 302, and that the government did not withhold the report from the Boltons; and erroneously stating that it was turned over as required *Jencks* material. The Fifth Circuit further ruled that, "Accordingly, the FBI 302 interview report does not qualify as *Brady* material citing *United States* v. *Swenson*, 894 F.3d at 683 (5th Cir. 2018)". The Court applied the wrong legal standard in citing *Swenson* to support their ruling. *Swenson does* not apply to Petitioners because they **never**

received the FBI 302 Report from the Government before, during or after trial, whereas in Swenson. Petitioners did not learn of the existence of the FBI 302 Report until after trial concluded when they received the Pre-Sentence Reports in November 2016, and that referenced statements attributable to John Lee Interview with the FBI the cashed checks were not for food and liquor which differed from the sworn testimony of IRS Agent Luker presented to the jury at trial.

Petitioners further argued in their motion in the district court requesting new trial and in their Appeal Brief that the suppression of the FBI Report by the government was a violation *Brady*. **The FBI 302 Report was evidence withheld from the defense** by the Government during discovery in the trial court, and it was not turned over to the defense as *Jencks* Material as alleged by the Fifth Circuit in its October 18, 2018 Opinion.

Petitioners filed timely motions requesting the district court order the Government to produce the FBI 302 report, and they, through counsel, filed a motion for new trial on the basis of this new evidence. In denying the Petitioners' motion the district court applied the wrong legal standard when addressing the Boltons' *Brady* claim, and the Government conceded the point on appeal. The government petitioned the Fifth Circuit in their opposition brief and requested a limited remand, noting that "the district court appears to have used an incorrect standard for determining materiality" regarding the FBI 302.

There was undeniably *Giglio* impeachment evidence that was material to Petitioners' defense – that the cashed checks were not *income* to them. The district court failed to conduct any test of the materiality of the suppressed FBI 302 Report of Interview evidence. Instead, the court concluded that the **evidence was not material or likely to produce acquittal** because of other facts cited in the record. This is not the standard for evaluating whether a violation of *Brady* occurred. The materiality inquiry is not just a matter of determining whether the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (citation omitted).

The district court thus erred when it ruled (in its denial of the Boltons' *Brady* claims regarding the John Lee statements that even without the cashed John Lee checks, there is sufficient evidence to support the guilty verdict. But *Brady* is not a sufficiency of the evidence test, and the court erred in applying it so.

The Appeal panel did not conduct any analysis of the district court's erroneous "materiality" assessment or reach a conclusion that the FBI Report was suppressed. It is well established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, fall under the **Fourteenth Amendment.** The same result applies when the State, although not soliciting false evidence, allows it to go uncorrected

when it appears." *Nupe v. Illinois*, 360 U.S. 264, 269 (1959).

After publication of the October 18, 2018, Opinion in this case, the Government promptly **filed an email notice and an October 22, 2018 Motion (App. C) with the** Court requesting correction of **information contained in the Opinion issued on October 18, 2018**, that incorrectly asserted there was no *Brady violation* because Petitioners Bolton were provided a copy of an FBI 302 Report (a report that Petitioners asserted was suppressed by the Government during discovery). The Opinion was therefore incorrect and needed to be corrected. The Fifth Circuit then took an inappropriate action by **attempting to only to correct the opinion administratively when there was a substantial issue of exceptional importance that needed to be analyzed and the correct legal standards and case law applied**. For this reason, the defendants objected to Government's request for an administrative correction to the Opinion.

B. October 23, 2018 Modified Opinion.

The Fifth Circuit overruled the defense's objection and instead **withdrew the October 18, 2018 Opinion and reissued a Modified Opinion and order on October 23, 2018,** granting **the Government's Motion for an administrative correction (App. D)** by incorrectly adjusting language pertaining the *Brady* violation appealed by Petitioners based on the Government's failure to produce the FBI 302 Report that documented statements made to the FBI by

John Lee in an interview that documents perjury by IRS Agent Luker.

The **Modified opinion of October 23, 2018,** did not correct the legal error suppression of the FBI 302 Report which was not provided by the Government to Petitioners Charles and Linda Bolton, or their Defense Counsel, and should have resulted in reversal of their convictions because it impeached the testimony of a key Government Witness.

Following the Fifth Circuit's failed attempt to correct an issue involving a substantial question of law pertaining to violations of the *Brady rule*, in the Court's Modified Opinion in this case, the Court erred again in its attempt to correct the opinion administratively by incorrectly stating the FBI 302 Report was turned over to the defense when it was not.

On October 24, 2018, The Government **filed a formal motion (App. E) notifying the Court that the information contained in the Modified Opinion issued on October 23, 2018**, that incorrectly asserted there was no *Brady* violation because Petitioners Bolton were provided a copy of an FBI 302 (and that Petitioners asserted were suppressed by the Government) was incorrect and needed to be corrected. The Government again requested correction of the Fifth Circuit's Modified Opinion issued on **October 23, 2018, to include language the FBI 302, Report was not turned over to the Boltons.**

The Fifth Circuit errered when it issued an order on October 26, 2018, granting the Government's Motion

(App. F) to Correct its Modified on October 23, 2018), as non-dispositive and without any further analysis of whether a *Brady* violation, with respect to the FBI 302 Report.

October 26, 2018 Modified Opinion Issued by the Fifth Circuit Pertaining to Petitioners' Brady Violation

The Fifth Circuit **withdrew the October 23, 2018 Modified Opinion and issued a third Opinion on October 26, 2018, (App. G),** attempting but **failing again** to provide the legal analysis of the *Brady* violation issue according to this court's precedence in *Giglio v. United States* 405 U.S. 150, 154 (1972) (quoting *Nupe,* 360 U.S. at 271) as briefed by Petitioners' in their Original Appeal Brief filed with the Fifth Circuit's or this court's legal precedents in *Napue v. Illinois* governing this issue.

Although the Government filed several motions with the Appeal Court noticing of the error in the opinion in which the Court **falsely ruled** that **there was no Brady violation because Appellant Bolton was provided a copy of the FBI 302** containing the statements impeaching IRS Agent Luker, the court failed as *Jencks Act material*, it still included language that stated "**Accordingly, the FBI 302 interview report does not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.**"

In addition, the Fifth Circuit failed to provide any relief on this issue although **the government conceded that the district court applied the wrong**

standard to the "materiality" prong when it denied the Petitioners' Brady violation.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit panel improperly applied the governing statutes regarding violations of Brady, suppression of evidence that affected the petitioners' constutional rights under the Fifth, Sixth, and Fourteenth Amendments.

Granting of the petition for review is needed to:

(1) Correct the district court's rulings and upheld by the Fifth Circuit regarding perjurious testimony of the key government witness directly led to convictions in this case and cannot be sustained.

(2) To Review and correct the panel opinion and failure to "give full consideration to the substantial evidence" presented in this case on appeal, and failing to provide necessary rulings at all when warranted.

(3) To correct the numerous publication of opinions in this case that do not conform the laws and governing legal principles so as to not establish a new legal precedent that will be unenforceable in the future.

CONCLUSION

The Fifth Circuit has entered a decision in this case that is in conflict with the decision of other courts of appeals on the same important matter, has decided an important federal question in a way the conflicts with the decisions of this court, and has so far departed from accepted and usual course of judicial proceedings, as to call for an exercise of the Court's supervisory power to correct.

For the foregoing reasons, this Court should grant the petition.

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Date: July 12, 2019