No. 23-4

In the
Supreme Court of the United States

John Thomas Minemyer, Petitioner

v.

Commissioner of Internal Revenue, 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

John Thomas Minemyer
Pro Se
4229 Highway 24
Bourg, LA 70343
tomminemyer@lozonsolutions.com

Question Presented for Review

26 U.S.C. § 6751 was added to the Code by section 3306 of the Internal Revenue Service Restructuring and Reform Act of 1998 (1998 Act), Public Law 105–206, 112 Stat. 685, 744 (1998).

The report of the United States Senate Committee on Finance regarding the 1998 Act (1998 Senate Finance Committee Report) provides that Congress enacted section 6751(b)(1) because of its concern that, "[i]n some cases, penalties may be imposed without supervisory approval." S. Rep. No. 105–174, at 65 (1998), 1998–3 C.B. 537, 601. The report further states that "[t]he Committee believes that penalties should only be imposed where appropriate and not as a bargaining chip." *Id.* The report provides that, to achieve this goal, section 6751(b)(1) "requires the specific approval of IRS management to assess all non-computer generated penalties unless excepted."

The Second Circuit concluded the intent of I.R.C. § 6751(b)(1)." "The statute was meant to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle." ("[T]he IRS will often say, if you don't settle, we are going to assert the penalties.").

The Tax Court has held that supervisory approval must be obtained before the first communication to the taxpayer that demonstrates that an initial determination has been made. *See, e.g., Beland* v. *Commissioner,* 156 T.C. 80 (2021); *Kroner* v. *Commissioner,* T.C. Memo. 2020–73, *rev'd* 48 F. 4th 1272 (11th Cir. 2022); *Carter* v. *Commissioner,* T.C. Memo. 2020–21, *rev'd* 2022 WL 4232170 (11th Cir. Sept. 14, 2022).

26 U.S.C. § 6751 Question:

Does the legislative history and intent combined with the Tax Court Judicial history, the internal revenue manual instructions, and the Supreme Courts application of the canons of construction for statute interpretation, require supervisory approval must be obtained before the first communication to the taxpayer that demonstrates that an initial determination has been made?

Plea Agreements and Rule 11

Almost 90 percent of all criminal cases are settled via plea agreements. This practice started to move into common use in the late 19th century but was considered inappropriate until the late 1960's.

Yet, there are very few protections offered to criminal defendants.

The strongest protection a defendant has should be contract law. While there is extensive well-established legal precedent to protect a defendant, the reality is that defendants, public defenders, prosecutors, and the courts are not well versed in contract law. This results in poorly written, misunderstood agreements that the courts misinterpret.

Rule 11 of the Federal Rules of Criminal Procedure offers little to strengthen the defendants' protections due to severe limitations in scope. Rule 11 is also widely misunderstood and seldom applied correctly by prosecutors or courts.

When all of this is combined with overworked, ineffective counsel that just wants the case off their desk and the massive power of the United States. The defendant gets an agreement without negotiation that he does not understand.

The consistent application and administration of contract law and the applicable legal statutes to plea agreements is of exceptional importance to protect the legal (due process) rights of defendants.

Plea agreements need a mandated legal structure that is simple to understand that also includes: an explanation of each applicable statute, and full disclosure of all materially relevant information (i.e collateral damages) as required by contract law.

Plea Agreement Question:

Does the Tenth Circuit's opinion regarding the plea agreement violate Rule 11 of the Federal Rules of Criminal Procedure and the well-established legal precedents regarding contract law and so the plea agreement does make the District Court judgement include all taxes, penalties, and interest?

List of Parties to Proceeding

Petitioner: John Thomas Minemyer, Pro Se
Respondents: Commissioner of Internal Revenue was the respondent in the United States Tax Court and the appellee in the court of appeals

List of Proceedings

United States District Court for the District of Colorado, United States of America v. John T. Minemyer 08-cr-00160-MSK-01, judgement entered October 1, 2009

United States Tax Court, No. 22182-10, John Thomas Minemyer v. Commissioner of Internal Revenue, partial summary judgement entered February 25, 2019

United States Tax Court, No. 22182-10, John Thomas Minemyer v. Commissioner of Internal Revenue, Trial Opinion entered July 1, 2020

United States Tax Court, No. 22182-10, John Thomas Minemyer v. Commissioner of Internal Revenue, Order July 7, 2021

United States Court of Appeals for the Tenth Circuit, Nos. 21-9006 & 21-9007, John Thomas Minemyer v. Commissioner of Internal Revenue, judgement entered January 19, 2023, effective date April 12, 2023

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United States Tax Court, No. 22182-10, *John Thomas Minemyer v. Commissioner of Internal Revenue*, Order July 7, 2021 included in Appendix B

United States Tax Court, No. 22182-10, *John Thomas Minemyer v. Commissioner of Internal Revenue*, Trial Opinion entered July 1, 2020, included in Appendix C

United States Court of Appeals for the Tenth Circuit, Nos. 21-9006 & 21-9007, *John Thomas Minemyer v. Commissioner of Internal Revenue, en banc revue denied* April 3, 2023 included in Appendix D

Statement of the Basis for the Jurisdiction

The Tenth Circuit entered judgment on January 19, 2023, effective date April 12, 2023, and denied Petitioner's timely petition for rehearing and rehearing en banc rehearing on April 3, 2023.

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

Constitutional Provisions and Statutes (Appendix E)

Constitutional Provisions

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Rule 11(c)(1)(B)
Rule 11(c)(1)(C)

Internal Revenue Code of 1986 (26 U.S.C.):
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Canons of Construction

Acquiescence Rule
Agency Interpretations
Grammar Canon

Mandatory / Permissive Canon
Ordinary Meaning Canon
Rule of Lenity
Strict Construction of Revenue Provisions
Surplusage Canon
Whole-Text Canon

STATEMENT OF THE CASE

This matter originated with petitioner's indictment on two counts of income tax evasion under I.R.C. § 7201 (one count for 2000 and one count for 2001) in the United States District Court for the District of Colorado.

The petitioner's patent had just been stolen and he had commenced patent litigation. To protect his patent lawsuit the taxpayer was forced to accept a plea under which he pleaded guilty to the 2000 count, and the Government dismissed the 2001 count.

The plea agreement specified that the District Judge would order restitution for all taxes, penalties, and interest. As the petitioner understood it, the judgement would resolve all tax issues and allow him to focus on the patent case.

The IRS later, converted and assessed the restitution and added penalties and interest for 2000 and 2001, even though they lacked authority.

The IRS was not granted that authority until the introduction of 26 § 6201(a)(4) on August 16, 2010, and per Public Law 111-237, Section 3 (c) "shall apply to restitution ordered after the date of enactment of this Act".

The petitioner, left with no other recourse, petitioned the Tax Court.

After initial briefings, Judge Paris ordered the case to trial, stating "Upon due consideration, it appears to the Court that there are material issues of fact in dispute. Summary judgment is not appropriate under these circumstances."

The case was transferred to Judge Ashford and after a 4-year delay she issued a partial summary judgement on February 25, 2019, upholding the 2000 and 2001 deficiencies and the 2000 penalty, but not the 2001 penalty.

During this delay the petitioner's judgement was satisfied and the Department of Justice issued a Satisfaction of Financial Responsibility.

By issuing the partial summary judgement without requesting updated briefing, Judge Ashford ruled without ever seeing this document.

This document was also never allowed by the Tenth Circuit in their decision.

The 2001 penalty went to trial before Judge Kerrigan on December 10, 2019.

Judge Kerrigan ruled that the respondent failed to meet the supervisory approval requirement of I.R.C. § 6751(b)(1) and its I.R.C. § 7491(c) burden of proof.

The petitioner appealed Judge Ashford's ruling (No. 21-9006), and the Commissioner cross appealed (No. 21-9007) to the United States Court of Appeals – Tenth Circuit.

The United States Court of Appeals for the Tenth Circuit, Nos. 21-9006 & 21-9007, upheld Judge Ashford's ruling and overturned Judge Kerrigans ruling.

The Tenth Circuit denied the petitioners motion to supplement the record and his petition for rehearing en banc. Therefore, the Tenth Circuit never heard nor considered the arguments in this petition in their judgement entered January 19, 2023, effective date April 12, 2023.

REASONS FOR GRANTING THE WRIT

26 U.S.C. § 6751(b)(1)

"No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate."

Statute interpretation is normally done through the application of certain techniques of statutory construction which have been "formalized" into "canons of construction." None of the Appeals Court decisions cited by the tenth circuit (*Roth, Chai, Kroner, Laidlaw*) applied the canons of construction in their statute interpretations.

The Tenth Circuit states, "To the extent *Roth* declares the entirety of § 6751(b)(1) ambiguous..." (footnote 5) and "In *Roth*, we held that a phrase in § 6751(b)(1), "the initial determination of such assessment," is ambiguous." (footnote 5).

These statements clearly indicate that the Tenth Circuit should have applied the Rule of Lenity - Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor and The Strict Construction of Revenue Provisions - Tax laws to be strictly construed against the state and for the taxpayer. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 -285 (1978)

The Tenth Circuit violated the Acquiescence Rule - the Court is to implicitly endorse an unbroken line of existing lower court judicial precedent. The Tax Court has set an extensive and consistent

precedent Regarding § 6751(b)(1) that also adheres to the previous canons.

As the Respondent stated "According to the Tax Court, if a supervisor does not approve the subordinate's "initial" determination before it is communicated to the taxpayer, then the supervisor would be approving something more like a "final" determination.

Instead of implicitly endorsing the Tax Court precedent, the Tenth Circuit gave undue weight to a few U.S. Court of Appeals cases.

The Tenth Circuits opinion conflicts with its prior decision in *Roth v. Comm'r*, 922 F.3d 1126, 1131 (10th Cir. 2019).

The Tenth Circuit stated, "In *Roth*, we held that a phrase in § 6751(b)(1), "the initial determination of such assessment," is ambiguous. 922 F.3d at 1132. That holding has no bearing on this case. We were required to interpret that phrase in *Roth* because the IRS had sent the taxpayer multiple notices with penalties of different amounts. *Id.* at 1130, 1133. We therefore had to determine which notice was the operative "initial determination." *See id.* at 1133. In other words, the case involved the *what* of the statute, not the *when*. The meaning of the phrase "initial determination of such assessment" is not implicated here, because although the IRS gave Mr. Minemyer three notices of civil fraud penalties, he concedes the penalties were identical in each instance. The question of which notice was the operative "initial determination" is therefore not material. To the extent *Roth* declares the entirety of § 6751(b)(1) ambiguous, we regard that declaration as dicta as to the specific issue presented here, which

is *when* written supervisory approval must be obtained." (footnote 5)

This paragraph violates several "canons of construction".

First, the Tenth Circuit violated 26 U.S.C. § 6751(c) to justify not applying *Roth* in this case. 26 U.S.C. § 6751(c) states, "For purposes of this section, the term "penalty" includes any addition to tax or any additional amount."

The Tenth Circuit applied the term "penalties" solely to the civil fraud penalties omitting "addition to tax" and "additional amounts". This violates the Ordinary-Meaning Canon - Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense. *Morse v. Republican Party of Virginia* (1996)

Second, the Tenth Circuit used that violation to determine that the three notices of civil fraud penalties were identical. There is no such thing as notices of civil fraud penalties, the Tenth Circuit is referring to the three different determinations, each of which was different per 26 U.S.C. § 6751(c).

By falsely claiming that all determinations were identical the Tenth Circuit decided, "The meaning of the phrase "initial determination of such assessment" is not implicated here." And "The question of which notice was the operative "initial determination" is therefore not material.". (footnote 5)

This is a blatant violation of the Whole-Text Canon - the statute text must be construed as a whole. Scalia & B. Garner, Reading Law 167 (2012)

It also violates the Surplusage Canon - if possible, every word and every provision is to be

given effect. None should be ignored. None should needlessly be given an interpretation that causes it to have no consequence. Since it was not considered by the Tenth Circuit, the term "initial determination" had no consequence in the opinion.

In the Supreme Court case *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA ET AL.*(2010) the Court states, ""[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant".

Since the operative term "initial determination" was never considered it was also never defined. Therefore, we shall define it by applying Plain Meaning - Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean. The Grammar Canon - Words are to be given the meaning that proper grammar and usage would assign them. and the Ordinary-Meaning Canon - Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.

When reading the entirety of 26 U.S.C. § 6751(b)(1) an "ordinary" or "reasonable" person (taxpayer) would read it this way (based on dictionary definitions):

No punishment shall be imposed unless the first decision of such imposition is personally approved (in writing) by the immediate supervisor.

The ordinary person understanding above identifies both "when" and "what".

When reading the entirety of 26 U.S.C. § 6751(b)(1) utilizing IRS definitions it reads:

No 26 U.S.C. § 6751(c) penalties shall be formally recorded unless the first written communication of penalties to a taxpayer, that offers an opportunity to sign an agreement or consent to assessment or proposal of penalty, is personally approved (in writing) by the immediate supervisor.

The IRS definitions understanding above identifies very specifically "what" is in the determination and "when" the supervisory approval must occur.

The IRS definition for penalties is from the statute. The definition for assessment comes from the tenth Circuit opinion. The definition for "initial determination" comes from the Internal Revenue Manual 4.19.13.7.1 (04-06-2022) - Supervisory Approval of Penalties(1)(B) and 20.1.1.2.3.1 (10-19-2020) - Timing of Supervisory Approval (1).

Per the Agency Interpretations, the Tenth Circuit will grant deference to an agency's interpretation of statutes, interpretation of the agency's own regulations, and interpretation of the agency's guidance, publications, and research, generally depending on the vagueness of the underlying text and how reasonable the agency's interpretation is. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (statutes); *Auer v. Robbins,* 519 U.S. 452 (1997) (agency regulations); *Skidmore v. Swift Co.*, 323 U.S. 134 (1944) (agency guidance).

The Tenth Circuit states, "In March 2010 a revenue agent visited Mr. Minemyer in prison and obtained his signature on a form proposing certain tax deficiencies and civil fraud penalties for 2000 and 2001. Those proposed penalties and deficiencies had not been approved by the agent's supervisor. Mr.

Minemyer's signature evidenced his consent to the proposed amounts, but he later withdrew his consent. The IRS therefore disregarded the form and in May 2010 sent Mr. Minemyer a letter, which the IRS calls a Letter 950 or a 30-day letter, proposing the same deficiencies and civil fraud penalties. That letter was approved by the revenue agent's immediate supervisor." (page 32)

Vital information is left out of this statement. Namely, that by the timing, location, personal delivery, and reference to the Appellants ex-wife's assets, the Revenue Agent intimidated the taxpayer into signing Form 4549.

I.R.C. § 6751(b)(1) is a restriction on the IRS; its text and legislative history clearly indicate it was meant to prevent such intimidation. As found in *Chai v. Comm'r*, 851 F.3d 190, 218 (2d Cir. 2017), "the court turned to the statute's legislative history, which it found reflected a purpose to prevent IRS agents from using penalties as a bargaining chip during pre-assessment negotiations."

Per the Tenth Circuit statement, the unapproved Form 4549 given to Mr. Minemyer on March 4, 2010, clearly met the IRS definition of an "initial assessment" which is "the first written communication of penalties to a taxpayer, that offers an opportunity to sign an agreement or consent to assessment or proposal of penalty."

Yet, as the Tenth Circuit states, "The IRS therefore disregarded the form...". As we saw earlier the Tenth Circuit also disregarded Form 4549 and the issue of the "initial determination" altogether. Violating the Whole-Text Canon and the whole Canon.

The IRS cannot simply disregard it's "initial determination" just because the taxpayer did not consent to the assessment. If the taxpayer had signed Form 4549, he would have had no further recourse and the IRS's 26 U.S.C. § 6751(b)(1) violation would have gone unchallenged.

The Tenth Circuit again violates the Ordinary-Meaning Canon by making a false statement to justify ignoring Form 4549. It says that in May 2010 the IRS sent "a 30-day letter, proposing the same deficiencies and civil fraud penalties.". This again ignores the 26 U.S.C. § 6751(c) definition of penalties and that the amounts in this document differ from those in the Form 4549.

The Tenth Circuit's opinion relies on *Chai,* which addressed only the "timing requirement" in § 6751(b)(1).

Chai was unique in that there was only (1) notification to the taxpayer (i.e. the notice of deficiency) and the question before the Court was whether the supervisory approval was required at any time prior to the Tax Court decision.

The Second Circuit found "It is not enough that approval be given before the Tax Court proceeding ends, however; for the supervisor's discretion to be given force, the approval must be issued before the Tax Court proceeding is even initiated. Section 6751 requires supervisory approval of "the *initial* determination of such assessment" (emphasis added)."

Thus, the Second Circuit determined that since the notice of deficiency is the last document prior to a Tax Court proceeding, it is the last moment in time that a supervisor can approve an assessment.

In *Chai v. Comm'r of Internal Revenue*, 851 F.3d 190, 218 (2d Cir. 2017) the Tenth Circuit ignored the Second Circuits finding "The provision clearly requires written approval of the "initial determination" before a penalty can be assessed."

The Second Circuits legislative history findings support the Petitioner regarding the intent of I.R.C. § 6751(b)(1)."The Committee believes that penalties should only be imposed where appropriate and not as a bargaining chip." "The statute was meant to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle." ("[T]he IRS will often say, if you don't settle, we are going to assert the penalties.").

The Second Circuit found, "If deficiency proceeding review of penalty determinations were sufficient to deter or detect the IRS's improper leveraging of undue penalties, then Congress would not have felt compelled to enact § 7491(c), which places the burden of production on the IRS in any court proceeding regarding the liability of a taxpayer for any penalty, along with § 6751." also, "More to the point, Tax Court review does not solve the problem—penalties could still be used as bargaining chips to prompt settlement negotiations and, if successful, the Tax Court would be none the wiser (since the taxpayer would have settled, rather than have filed a Tax Court petition where the propriety of the penalty could be litigated)." *Chai v. Comm'r of Internal Revenue*, 851 F.3d 190, 218 (2d Cir. 2017)

As the Second Circuit stated, the notice of deficiency is the "last moment" that approval of an "initial determination" matters.

This is because in Chai, the notice of deficiency was the "initial determination". Since there were no

previous notices to the taxpayer, Chai merely established the notice of deficiency as the last point in time that an approval may occur.

Chai did not modify the meaning of "initial determination" from the first or original determination.

Therefore, to prevent taxpayer intimidation, the original "initial determination," must be approved when it is created in order to satisfy I.R.C. § 6751(b)(1).

If done any other way, I.R.C. § 6751(b)(1) becomes inoperative and insignificant. Failing to meet the statutes intent and purpose to prevent the intimidation of a taxpayer by IRS officials.

Clay v. Commissioner, 152 T.C. 223 (2019) interpreted Chai as having "left open" the question "whether approval can come after the agent sends the taxpayer proposed adjustments that include penalties."

Clay distinguished *Chai* on the ground that the revenue agent's report in *Clay* was the "initial determination" under § 6751(b)(1), whereas in *Chai* the initial determination came later in the notice of deficiency. *See Clay*, 152 T.C. at 248–49.

Chai did not need to determine whether the "initial determination" under § 6751(b)(1) was made before the notice of deficiency because there had been none. Therefore, *Chai* did not address what act or document constituted the "initial determination."

In Kroner v. Commissioner, T.C. Memo. 2020–73, rev'd 48 F. 4th 1272 (11th Cir. 2022), the Eleventh Circuit relied on the Ninth Circuit's opinion in *Laidlaw's Harley Davidson Sales, Inc. v. Comm'r, 29 F.4th 1066, 1070-74 (9th Cir. 2022)*, to conclude that the IRS satisfies section 6751(b) "so long as a

supervisor approves an initial determination of a penalty assessment before it assesses those penalties."

The Eleventh Circuit's opinion states that they took a textualist approach in analyzing the statute but a textualist approach requires an understanding of the parts of speech in the English language.

The court determined that the IRS did not violate section 6751(b) because a supervisor approved the taxpayer's penalties, and they had not yet been assessed. The *Kroner* court reasoned that this was the best reading of the statute because it is more consistent with the meaning of the phrase "initial determination of such assessment".

In analyzing the phrase "initial determination of such assessment," the *Kroner* court stated that the word "assessment" has an established legal meaning in the context of the Code, which is the act of recording a taxpayer's liability onto the government's books. This same mistake was made by the Chai and Laidlaw Courts.

In the context of this nomenclature, the *Kroner* court stated that "the IRS makes a determination of assessment when it concludes it has the authority and duty to assess penalties and actually does so." The court stated that it "only deals with the formal process of calculating and recording the tax debt on the government's books.""

The Eleventh and Ninth Circuits used this flawed logic to determine that the "assessment" is the "what" that requires supervisory approval and establishes a "timing requirement" that is tied to the term "assessment". If "approval is only required prior to assessment" the Court has effectively invalidated the statute.

There are several issues with this analysis. First by isolating a single word in the text, the Courts have violated the Whole-Text Canon, the Surplusage Canon, and the Grammar Canon and applied an incorrect meaning to the term "assessment".

I.R.C. § 6751(b)(1) states:

"No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate."

Using a parts of speech tagger program to analyze the entire statute you find where the Courts erred in their analysis.

"assessed" - a verb (action) meaning "the "ministerial act of recording the tax debt on the government books".

"unless" - a preposition that establishes the relationship between the action "assessed" and the thing "determination of such assessment" (nouns) that follow.

"the" - is a determiner (definite article) that refers to the specific thing that follows it.

"initial" - an adjective that describes the following noun by making it the first or original.

"determination" – is a noun designating a thing, not an action.

"of" - is a preposition that ties the noun "determination" to the noun "assessment".

"such" - an adjective that describes the following noun.

"assessment" -is a noun designating a thing, not an action.

Thus, "initial determination of such assessment" becomes a single thing that refers to the original calculation that determines the amount of taxes, penalties, and interest".

So, the application of the Grammar Canon thereby illustrates that the Courts erred in their definition of the term "assessment" as a verb (action) instead of noun (thing).

Even worse, the Courts then applied the adjective "initial" to the incorrect definition of "assessment" and skipped over the term "determination" giving it no weight, in violation of the Surplusage Canon.

These changes modify "what" requires supervisory approval from the "original calculation that determines the amount of taxes, penalties, and interest" to the "first ministerial act of recording the tax debt on the government books."

If the "assessment" becomes the item requiring approval, the timing for the approval moves to the end of the process. Thus, nullifying the statute's intent.

As Judge Berzon wrote in his dissent in *Laidlaw's Harley Davidson Sales, Inc. v. Comm'r, 29 F.4th 1066, 1070-74 (9th Cir. 2022),* "Unlike the word "until," the word "unless" is not a temporal limitation but a substantive one; it tells us that A may not happen "unless" B happens. Here A is the assessment of penalties and B is personal approval by a supervisor of an initial determination by a subordinate. So § 6751(b)(1) provides a remedy for the taxpayer if the rule requiring approval as a condition of an enforceable *initial* determination is

not followed, even if the supervisory approval of a later, *final* determination (e.g., pursuant to the letter received by the taxpayer in this case, a determination following an objection by the taxpayer to the initial determination) occurs at a time when approval can still be withheld. That is, absent such approval of the initial determination, "[n]o penalty ... shall be assessed.""

PLEA AGREEMENT ARGUMENT

The Tenth Circuit's opinion violates Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C. §§ 3663(a)(3), U.S.S.G. § 5E1.1, U.S.S.G. § 2T1.1, contract law, and Judge Kriegers restitution order.

In Title 26 tax cases, where the sentencing guideline for restitution is U.S.S.G. § 5E1.1(a)(1) the District Court may only order restitution in one of two ways. The District Court may order restitution as part of supervised release per 18 U.S.C. § 3663A or as an independent part of the sentence per 18 U.S.C. § 3663(a)(3).

Per the District Court Judgement dated October 1, 2009, restitution was ordered as an independent part of the sentence per 18 U.S.C. § 3663(a)(3) which states "The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.". *see United States v. Anderson*, 545 F.3d 1072, 1077-78 (D.C. Cir. 2008); *United States v. Firth*, 461 F.3d 914, 920 (7th Cir. 2006).

Per contract law, the plea agreement in this case is a *bilateral* contract because the attorney for the government made the promises governed by Rule 11(c)(1)(A) and dropped Count 2 in exchange for the defendants promises governed by Rule 11(c)(1)(C).

Each party is bound to its own promises and bound to the other party's promises.

Per Rule 11 of the Federal Rules of Criminal Procedure, the plea agreement in this case is a multi-faceted agreement where different sections and/or items are governed by different provisions of Rule 11. Items where the attorney for the government agrees to specific charging orders are governed by Rule 11(c)(1)(A). Items where the attorney for the government does not oppose or recommends a sentence or range are governed by Rule 11(c)(1)(B). Items where the attorney for the government agrees that a specific sentence or range is appropriate are governed by Rule 11(c)(1)(C).

To apply these legal standards, it is necessary to identify the governing law for each item in the plea agreement. Any items not governed by contract law or Rule 11 do not contain any legally enforceable rights or obligations.

Section I Plea Agreement

Item 1 (page 1) - contract law, Rule 11(c)(1)(C).
Item 2 (page 1) - contract law, Rule 11(c)(1)(C).
Item 3 (page 1) - contract law, Rule 11(c)(1)(C).
Item 4 (page 2) - contract law, Rule 11(c)(1)(A).
Item 5 (page 2) - contract law, Rule 11(c)(1)(A).
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Item 7 (page 2) – statement (misnomer) by U.S. Attorney

Section II Elements of Offense

Item 8 A thru D (page 2) – statement by U.S. Attorney

Section III Maximum Statutory Penalties

Items 9 thru 11 (page 3) – statement by U.S. Attorney

Section IV Stipulation of Factual Basis and Facts Relevant to Sentencing
Item 12 (page 3) – statement by U.S. Attorney
Item 13 (page 3) – contract law, Rule 11(c)(1)(C).
Item 14 (pages 3 & 4) – statement by U.S. Attorney
Item 15 (page 4) – statement by U.S. Attorney
Item 16 (page 4 & 5) – statement by U.S. Attorney - last line is Rule 11(c)(1)(B)
Section V Sentencing Computation (mislabeled as Section IV)
Item 17 (pages 5 & 6) – statement by U.S. Attorney
Item 18 (page 6) – Rule 11(c)(1)(B)
Item 19A (page 6) – Rule 11(c)(1)(C)
Item 19B thru 19I (pages 6 & 7) - Rule 11(c)(1)(B)
Item 19J (page 7) – Rule 11(c)(1)(C)
Section VI Sentencing Variance (mislabeled as Section V)
Item 20 (pages 7 & 8) – Rule 11(c)(1)(B).
Section VII Why the Proposed Plea Disposition is Appropriate (mislabeled as Section VI)
Item 21 (page 8) - Rule 11(c)(1)(B).

The restitution amount and what is included in that restitution is the issue in this case. Since the only issue before the Court is the restitution amount, we need only examine how these governing laws apply to the items pertaining to restitution.

Section I Plea Agreement, Item 3 (page 1)

"The defendant agrees to pay restitution to the Internal Revenue Service (IRS) in the amount of all taxes, interest, and penalties due and owing from

the tax years 2000 and 2001. The defendant also agrees to file complete and accurate tax returns for the years 2000 and 2001."

The Tenth Circuit Opinion stated, "But the plea agreement simply recited what Mr. Minemyer agreed to; it did not obligate the district court to order any specific amount of restitution." (page 36)

This statement alone violates contract law, Rule 11, and 18 U.S.C. §§ 3663(a)(3).

If the plea agreement language states, "the defendant / government (USAO) / or parties, agrees / will, and then includes an action, it forms a binding agreement upon both parties (Minemyer & United States). Per contract law and the mandatory / permissive canon - mandatory words (agrees, will) impose a duty.

The defendant and government agreed to an action (i.e. pay restitution) and a specific sentence (i.e. all taxes, interest, and penalties due and owing from the tax years 2000 and 2001). Therefore, Rule 11(c)(1)(C) applies to Item 3 and the District Court can order restitution per 18 U.S.C. §§ 3663(a)(3).

Since the District Court accepted the plea agreement and Rule 11(c)(1)(C) applies to Item 3, the District Court is obligated to order restitution in any amount, not to exceed the amount of all taxes, interest, and penalties.

Section I Plea Agreement, Item 7 (page 2)

"This plea agreement is made pursuant to Rule 11(c)(1)(A) and (B) of the Federal Rules of Criminal Procedure."

This statement is a misnomer. It is not an agreement and is not binding on the parties or the District Court.

The plea agreement language determines which Rule 11 designation governs each item.

A Rule 11(c)(1)(C) agreement is required for the District Court to order restitution.

Section IV Stipulation of Factual Basis and Facts Relevant to Sentencing, Item 16 (page 4)

Is a stipulation of facts, by the government, of issues relevant to sentencing. Per U.S.S.C. §6B1.4 Comm. the stipulations are not an agreement between the parties.

The last line though is a non-binding sentencing recommendation, governed by Rule 11(c)(1)(B), it reads, "The total loss for both years is $200,918.22."

So, when the Tenth Circuit stated, "Elsewhere the plea agreement states that the IRS's loss was $200,918—the amount comprising Mr. Minemyer's under-reported tax liability for 2000 and 2001." (page 36) They modified the plea agreement language, as written by the U.S. Attorneys, from "total loss" to "IRS's loss" and/or "under-reported tax liability". This violates the ordinary-meaning canon and express terms requirement. The plea agreement must be read as written by the U.S. Attorney.

The Tenth Circuit used the modified language and meaning to define $200,918 to mean only taxes in item 3. This violates the whole-text canon, wherein the definition (amount) for taxes, interest, and penalties in item 3, is recommended (compromised) by the U.S. Attorney in 19A and finally determined by Judge Krieger (at her discretion) in her restitution order per item 19J. *United States v. Jordan*, 853 F.3d 1334, 1341 (10th Cir. 2017).

Section V Sentencing Computation (mislabeled as Section IV) Item 18 (page 6)

"The parties understand that the Court may impose any sentence, up to the statutory maximum, regardless of any guideline range computed, and that the Court is not bound by any position of the parties."

This statement is a misnomer. It is not an agreement and is not binding on the parties or the District Court.

The Court is bound by items in the plea agreement that are governed by Rules 11(c)(1)(A) and (C). Items governed by Rule 11(c)(1)(A) cannot be modified by the Court. Items governed by Rule 11(c)(1)(C) set upper limits that the Court cannot exceed.

Section V Sentencing Computation (mislabeled as Section IV) Item 19A (page 6)

"The base guideline is U.S.S.G. § 2T1.1(a)(1)."

Item 19A is governed by Rule 11(c)(1(C) because it sets U.S.S.G. § 2T1.1(a)(1) as the sentencing guideline for tax evasion.

Per U.S.S.G. § 2T1.1 Application Note 1 – "The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 ..."

Interest and penalties are not included for purposes of sentencing and restitution except in the case of plea agreements where an accurate tax loss is established.

In this case, an accurate tax loss was known from the defendants amended tax returns. Therefore, the amount of taxes, interest, and penalties was readily available.

Section V Sentencing Computation (mislabeled as Section IV) Item 19J (page 7)

"Pursuant to guideline § 5E1.1(a)(1), the Court shall enter a restitution order for the full amount of the IRS's losses."

Item 19J is governed by Rule 11(c)(1(C) because it sets U.S.S.G. § 5E1.1(a)(1) as the sentencing guideline for restitution.

§5E1.1 – Restitution

In the case of an identifiable victim, the court shall—enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264,§ 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or

In Title 26 tax cases, where the sentencing guideline for restitution is U.S.S.G. § 5E1.1(a)(1) the District Court may only order restitution in one of two ways. The District Court may order restitution as part of supervised release per 18 U.S.C. § 3663A or as in this case, as an independent part of the sentence per 18 U.S.C. § 3663(a)(3).

Since §§ 3663 does not apply to Title 26 tax cases the restitution order may only be issued per 18 U.S.C. §§ 3663(a)(3) which states, "The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."

The "extent agreed to" is only listed in item 3 of the plea agreement (i.e. all taxes, penalties, and interest).

The restitution amount that satisfies item 3 is to be defined by Judge Kreiger. As the Tenth Circuit stated (page 36), "[T]he district judge enjoys considerable discretion as to whether [to] order restitution, and if so, as to the amount."

The Tenth Circuit stated, "There are two problems with Mr. Minemyer's contention."

"First, the plea agreement contains an

integration clause, which bars Mr. Minemyer from offering extrinsic evidence to prove his understanding. *See id.* ("the second-step reasonableness inquiry is severely limited" by the presence of an integration clause in a plea agreement)." (page 35)

This is an accurate statement; you will note that this analysis has only covered items specifically written in the plea agreement.

"Second, the plea agreement contains no language prohibiting the IRS from assessing civil fraud penalties." (page 35)

The inclusion of civil fraud penalties in item 3 of the plea agreement, a Rule 11(c)(1)(C) clause, agreed to by the U.S. Attorney and binding upon the District Court, requires the inclusion of the penalties in the restitution order. Inclusion of the civil fraud penalties in the restitution prohibits the IRS from assessing the civil fraud penalties because 26 § 6201(a)(4) was not yet in effect. So, the IRS lacked authority to convert, assess, or collect the restitution.

The Tenth Circuit then stated, "The only promises made by the government were that it would file no other federal criminal charges based on matters then known to it and that Mr. Minemyer would receive a one-level reduction in his offense level for purposes of calculating his sentence." (page 35)

These Rule 11(c)(1)(A) statements are items 4 & 5. It is important to note the wording of these (2) statements. Both state "the government agrees" and then state an action.

This is identical to the wording in items 1, 2, and 3 where "the defendant agrees" to specific actions.

Yet the Tenth Circuit failed to recognize Item 3 as a binding promise governed by Rule 11(c)(1)(C).

Further, the Tenth Circuit did not apply the well-established legal precedent regarding the interpretation of plea agreements.

"It is well-settled that plea agreements are contractual in nature and courts will resort to traditional principles of contract law when interpreting and enforcing the promises in a plea agreement. *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997); see also *United States v. Brumer*, 528 F.3d 157, 158 (2nd Cir. 2008); *United States v. Williams*, 510 F.3d 416, 422 (3rd Cir. 2007); *United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2007); *United States v. Sanchez*, 508 F.3d 456, 460 (8th Cir. 2007); *United States v. Newbert*, 504 F.3d 180, 185 (1st Cir. 2007); *United States v. Lewis*, 476 F.3d 369, 387 (5th Cir. 2007); *United States v. Morris*, 470 F.3d 596, 600 (6th Cir. 2006); *United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Lockwood*, 416 F.3d 604, 607 (7th Cir. 2005); *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005); *United States v. Ahn*, 231 F.3d 26, 35-36 (D.C. Cir. 2000)

Prosecutors must be precise in drafting plea agreements because any ambiguities in the contract terms normally will be resolved against the government. See, e.g., *United States v. Cope*, 527 F.3d 944, 950 (9th Cir. 2008); *United States v.Williams*, 510 F.3d at 422; *United States v. Griffin*,510 F.3d 354, 360 (2d Cir. 2007); *United States v. Jordan*, 509 F.3d at 195-96; *United States v. McCoy*, 508 F.3d 74, 78 (1st Cir. 2007); *United States v. Mosley*, 505 F.3d 804, 809 (8th Cir. 2007); *United States v. Moncivais*, 492 F.3d 652, 662-63

(6th Cir.), cert. denied, 128 S. Ct. 633 (2007); *United States v. Cachucha*, 484 F.3d 1266, 1270 (10th Cir. 2007);*United States v. Farias*, 469 F.3d 393, 397 (5th Cir. 2006); *United States v. Copeland*, 381 F.3d 1101, 1105-06 (11th Cir. 2004); *United States v. Atkinson*, 259 F.3d 648, 654 (7th Cir. 2001); *United States v. Pollard*, 959 F.2d 1011, 1027-28 (D.C. Cir. 1992).

As one court noted, "in the absence of an agreement 'clearly under-stood by all the parties, carefully memorialized, and fully dis-closed to the Court,' the government must bear the disadvantage of ambiguity or omission. *United States v. Vergara*, 791 F. Supp. 1095, 1099-1100 (N.D. W.Va. 1992) (quoting *United States v. Gianakakis*, 671 F. Supp. 64, 72 (D. Me. 1987)); see *also United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (holding the government to a greater degree of responsibility than the defendant or parties to commercial contracts for ambiguities in plea agreements).

United States v. Lieber, 473 F. Supp. 884, 893-94 (E.D.N.Y. 1979) (stating that the fact that the government struck a bad bargain should not weigh against the defendants).

In the same vein, bargains inducing pleas based on governmental mistakes must likewise be enforced *United States v. Partida-Parra*, 859 F.2d 629, 632-33 (9th Cir. 1988).

CONCLUSION

For the foregoing reasons, Mr. Minemyer respectfully requests that this Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals – Tenth Circuit.

Respectfully submitted,

/s/ John Thomas Minemyer
John Thomas Minemyer, Pro Se
4229 Highway 24
Bourg, LA 70343
tomminemyer@lozonsolutions.com

No._____

In the
Supreme Court of the United States

John Thomas Minemyer, Petitioner

v.

Commissioner of Internal Revenue, Respondent

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

APPENDIX

John Thomas Minemyer
Pro Se
4229 Highway 24
Bourg, LA 70343
tomminemyer@lozonsolutions.com
