

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 08-10651-DD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHERRY PEEL JACKSON,
Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District of Georgia

BRIEF FOR APPELLEE

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, :
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 Appellee, :
 :
 :
 v. :
 :
 :
SHERRY PEEL JACKSON, :
 :
 :
 Appellant. :

APPEAL NO. 08-10651-DD

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In addition to the persons listed by Appellant, the United States submits that other persons and entities known to have an interest in the outcome of this appeal are:

- Becraft, Lowell H. Jr., Esq.
- Dickstein, Jeffrey A., Esq.
- Giannullo, Joseph M., Esq.
- Langway, Richard M., Esq.
- Lietz, Warren Carl, III, Esq.
- Nahmias, David E., United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

The government respectfully submits that oral argument is not necessary in this case.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal from the judgment and sentence of the district court, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING SUA SPONTE TO DISMISS THE CRIMINAL INFORMATION, BECAUSE THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER THE OFFENSE OF WILLFUL FAILURE TO FILE FEDERAL INCOME TAX RETURNS.
- II. WHETHER THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING SUA SPONTE TO DISMISS THE CRIMINAL INFORMATION, **BECAUSE A CRIMINAL INFORMATION ALLEGING VIOLATIONS OF 26 U.S.C. § 7203** MAY CHARGE A VIOLATION OF LAW AND REGULATIONS IN THE CONJUNCTIVE, AND DOES NOT REQUIRE IDENTIFICATION OF REGULATIONS.
- III. WHETHER DEFENDANT WAIVED HER RIGHT TO ARGUE THAT THE CRIMINAL INFORMATION WAS DEFICIENT IN THAT IT FAILED TO ALLEGE AN EXCEPTION IN ORDER TO GAIN THE BENEFIT OF SECTION **6531(4)**'S 6-YEAR STATUTE OF LIMITATIONS FOR OFFENSES OF WILLFULLY FAILING TO MAKE A RETURN AT THE TIME OR TIMES REQUIRED BY LAW OR REGULATIONS.
- IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REJECTING AS UNTIMELY DEFENDANT'S CLAIM THAT THE PAPERWORK REDUCTION ACT OF 1995 PROTECTED HER FROM

26 U.S.C. § 7203'S PENALTIES FOR FAILURE TO FILE TAX RETURNS.

V. WHETHER DEFENDANT WAIVED HER RIGHT TO ARGUE THAT A TAXPAYER CAN ASSERT A FIFTH AMENDMENT PRIVILEGE TO JUSTIFY A WILLFUL FAILURE TO FILE A TAX RETURN.

VI. WHETHER DEFENDANT WAIVED HER RIGHT TO ARGUE THAT AN INDICTMENT IS REQUIRED FOR PROSECUTION OF 26 U.S.C. § 7203 MISDEMEANOR OFFENSES.

VII. WHETHER THE DEFENDANT MAY SERVE HER SENTENCE IN ANY INSTITUTION DESIGNATED BY THE BUREAU OF PRISONS, OTHER THAN A U.S. PENITENTIARY, UNLESS SHE CONSENTS.

VIII. WHETHER THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING SUA SPONTE TO DISMISS THE CRIMINAL INFORMATION, BECAUSE PROSECUTION AND TRIAL OF AN OFFENSE AGAINST THE UNITED STATES IS PROPERLY BROUGHT IN A UNITED STATES DISTRICT COURT IN A DISTRICT WHERE THE OFFENSE WAS COMMITTED.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

On April 13, 2007, the United States Attorney for the Northern District of Georgia filed a criminal information charging the defendant, Sherry P. Jackson, with four counts of willful failure to file an income tax return for the years 2000, 2001, 2002, and 2003, in violation of 26 U.S.C. § 7203. (Doc. 1). On April 26, 2007, defendant was arraigned and pleaded not guilty to Counts One through Four of the Information. (Doc. 5).

The defendant's trial began on October 29, 2007. (Doc. 42). On October 30, 2007, the jury found the defendant guilty on all four counts. (Doc. 45).

On February 20, 2008, the defendant was sentenced to the custody of the United States Bureau of Prisons to be imprisoned for a term of 12 months on each of Counts One through Four of the Information, to run consecutively, ordered to pay a special assessment of \$100, and upon release from imprisonment, to serve one (1) year on supervised release. (Doc. 96). On February 11, 2008, defendant filed a timely notice of appeal. (Doc. 80). Defendant is currently in custody serving her sentence at FCI Coleman.

2. Statement of the Facts

The defendant was employed by the Internal Revenue Service as a revenue agent from 1988 to 1995. (Doc. 54-90-94). She filed

federal income tax returns until 1999. (Doc. 54-102-103; GX 98; GX 99). She did not file federal income tax returns for the calendar years 2000 through 2003. (Doc. 54-103; GX 100A; GX 200A; GX 300A; GX 400A). The gross income of the defendant of \$139,116 for calendar year 2000, \$69,919 for calendar year 2001, \$126,013 for calendar year 2002, and \$94,394 for calendar year 2003, was sufficient to require the defendant to make a tax return for those calendar years. (Doc. 54-35-38; GX 101, GX 201, GX 301, and GX 401; Doc. 54-58-64; GX 102 to 122; Doc. 54-76-77; GX 500; GX 100A, 200A, 300A, 400A).

The thrust of the defendant's defense at trial was that her failure to file tax returns was not willful. (Doc. 54-8-9, 12-24). The defendant testified that her belief was based on interpretations of the Internal Revenue Code, printed materials obtained from the Internal Revenue Service, and a study of decisions of the United States Supreme Court. (Doc. 54-80, 103-125; GX 55-130-147, 149, 161, 163-170; Doc. 55-229).

3. Standard of Review

I., II., and VIII. Jurisdictional claims raised for the first time on appeal are reviewed for plain error. See [United States v. Williams](#), 121 F.3d 615, 618 (11th Cir. 1997). Under plain error review, there must be (1) an error, (2) that is plain, and (3) that affects substantial rights. [United States v. Olano](#), 507 U.S. at 732, 113 S.Ct. at 1776. [United States v. Williams](#), ___ F.3d ___,

2008 WL 2066095 (11th Cir. May 16, 2008). The plain error standard is a "difficult" and "daunting" one to meet. [United States v. Rodriguez](#), 398 F.3d 1291, 1298 (11th Cir. 2005). A defendant must demonstrate that: (1) the district court committed error; (2) the error was "plain"; and (3) the error affected his substantial rights. [Id.](#) If the defendant demonstrates all three circumstances, then the Court of Appeals may exercise its discretion to correct the error but only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." [Id.](#) (internal quotation marks and quoted authority omitted). An error cannot be plain unless it is clear and obvious under current law, and an error cannot be clear and obvious under current law without precedent directly resolving the issue. [United States v. Aquillard](#), 217 F.3d 1319, 1321 (11th Cir. 2000); [United States v. Humphrey](#), 164 F.3d 585, 588 (11th Cir. 1999).

III., V. & VI. Under [Fed. R. Crim. P. 12](#), a claim alleging either a defect in instituting the prosecution or a defect in the criminal information is waived if not raised in a pretrial motion, unless the claim is that the information fails to invoke the court's jurisdiction or to state an offense. [See Fed. R. Crim. P. 12\(b\)\(3\)\(A\) & \(B\) and \(e\)](#); [United States v. Ramirez](#), 324 F.3d 1225, 1227-28 (11th Cir. 2003).

IV. The district court's refusal to entertain an untimely motion to dismiss is reviewed for abuse of discretion. See [United States v. Clarke](#), 312 F.3d 1343, 1345 n.1 (11th Cir. 2002).

VII. The court reviews de novo questions of law. [United States v. DeVegter](#), 439 F.3d 1299, 1303 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

I. A United States district court has subject matter jurisdiction over all offenses against the laws of the United States, including the offenses of willful failure to file federal income tax returns, in violation of [26 U.S.C. § 7203](#), as charged in defendant's criminal information.

II. It is proper pleading to charge an offense under [26 U.S.C. § 7203](#) alleging a violation of law and regulations. An offense may be charged in the conjunctive where the statute specifies several means or ways in which an offense may be committed in the disjunctive. Proof of either means is sufficient. The information was sufficient to charge the crime of violation of [26 U.S.C. § 7203](#), as it stated the elements of the offense charged, fairly informed the defendant of the charges, and enabled the defendant to plead an acquittal or conviction to bar subsequent prosecution for the same offenses. No citation to [26 U.S.C. § 6012](#) was necessary.

III. A statute of limitations defense is not available to the defendant for the first time on appeal. It is a defense that is a challenge to the sufficiency of the indictment, and must be raised before trial or it is waived. Even if the defendant had raised this defense timely, it has no merit, because the offense of willfully failing to make a return in violation of [26 U.S.C. § 7203](#)

falls within the 6-year limitations period provided by 26 U.S.C. § 6531(4).

IV. The Paperwork Reduction Act of 1995 does not protect the defendant from 26 U.S.C. § 7203 penalties for failure to file tax returns.

V. The defendant cannot assert a Fifth Amendment privilege to justify willful failure to file tax returns.

VI. An indictment is not required for the prosecution of misdemeanor offenses under 26 U.S.C. § 7203.

VII. The defendant may serve her sentence in any institution designated by the Bureau of Prisons, other than a U.S. Penitentiary, unless she consents.

VIII. Prosecution and trial of 26 U.S.C. § 7203 offenses against the United States are properly brought in a United States district court in the district where the offenses were committed.

ARGUMENT AND CITATIONS OF AUTHORITY

- I. THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING SUA SPONTE TO DISMISS THE CRIMINAL INFORMATION, BECAUSE THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER THE OFFENSE OF WILLFUL FAILURE TO FILE FEDERAL INCOME TAX RETURNS.

The defendant contends for the first time on appeal that the United States lacks standing to sue a "Citizen of the State of Georgia," in any "Article III United States inferior court created by Congress." Defendant's Brief at 14-15, 16, 21. The defendant's contention that the district court does not have subject matter jurisdiction over the offenses of willful failure to file federal income tax returns is subject to the plain error standard of review, and it is frivolous. [United States v. Evans, 717 F.2d 1334 \(11th Cir. 1983\)](#).

Subject matter jurisdiction defines the district court's authority to hear a given type of case. [United States v. Morton, 467 U.S. 822, 282 \(1984\)](#). Congress conferred the authority to hear criminal cases on the lower courts by statute, [18 U.S.C. § 3231](#), which explicitly vests federal district courts with original jurisdiction over all offenses against the laws of the United States, exclusive of the State courts.¹

¹Title 18, United States Code, Section 3231, provides in pertinent part:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against

In [Alikhani v. United States](#), 200 F.3d 732, 734 (11th Cir. 2000), this Court explained: "Subject matter jurisdiction defines the court's authority to hear a given type of case...", quoting [United States v. Morton](#), 467 U.S. 822 (1984). In [McCoy v. United States](#), 266 F.3d 1245, 1252 n. 11 (11th Cir. 2001), the Court pointed out that "[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231," and, in almost all criminal cases, "[t]hat's the beginning and the end of the 'jurisdictional' inquiry." The district court had subject matter jurisdiction in this case to try the defendant on the information. See [United States v. Engstrom](#), 7 F.3d 1423, 1424 (9th Cir. 1993) (district court has jurisdiction in 26 U.S.C. § 7203 cases pursuant to 18 U.S.C. § 3231); [United States v. McCarty](#), 665 F.2d 596, 597 (5th Cir. 1982) (same).

Defendant's argument that the United States Attorney lacked "standing" to bring the case is also meritless. The conduct of litigation in which the United States is a party is reserved to officers of the Department of Justice under the direction of the Attorney General. 28 U.S.C. § 516. More specifically, each United States Attorney, within his district, shall prosecute for all offenses against the United States. 28 U.S.C. § 547.

the laws of the United States.

II. THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING SUA SPONTE TO DISMISS THE CRIMINAL INFORMATION, BECAUSE A CRIMINAL INFORMATION ALLEGING VIOLATIONS OF 26 U.S.C. § 7203 MAY CHARGE A VIOLATION OF LAW AND REGULATIONS IN THE CONJUNCTIVE, AND DOES NOT REQUIRE IDENTIFICATION OF REGULATIONS.

The defendant contends for the first time on appeal that the criminal information against her, alleging violations of 26 U.S.C. § 7203 required "identification of regulations," because "Section 7203 makes several different acts prohibited." Defendant's Brief at 22. She apparently argues that when the government charges in the conjunctive, the government must prove both allegations. The defendant also contends for the first time on appeal that the information fails to allege an offense under 26 U.S.C. § 7203, because it does not mention 26 U.S.C. § 6012, which requires that a tax return be filed. Defendant's brief at 27. These contentions are subject to the plain error standard of review, and have no merit.

Title 26, Section 7203, provides in pertinent part:

Any person...required by this title or by regulations made under authority thereof to make a return...who willfully fails to...make such return...at the time or times required by law or regulations, shall in addition to other penalties provided by law be guilty of a misdemeanor and upon conviction thereof shall be...imprisoned for not more than one year....

26 U.S.C. § 7203 (emphasis added). It is proper pleading to charge offenses in an information in the conjunctive where a statute specifies several means or ways in which an offense may be

committed in the disjunctive, and only one of the several means or ways of committing the offense need to be proved. [United States v. Rivera](#), 77 F.3d 1348, 1352 (11th Cir. 1996); [United States v. Burton](#), 871 F.2d 1566, 1573 (11th Cir. 1989); [Smith v. United States](#), 234 F.2d 385, 389 (5th Cir. 1956). Here, the government properly charged in the conjunctive.

The information charged that the defendant was required by Title 26 of the United States Code, and by regulations made under the authority thereof, to make a federal income tax return and willfully failed to make such return at the time required by such law and such regulations. (Doc. 1). Under the law, the government was permitted to prove either means of violation of § 7203, that is, that defendant violated either the law or regulations.

The defendant's contention that an information charging violations of 26 U.S.C. § 7203 must cite 26 U.S.C. § 6012 was put to rest by the Fifth Circuit in [United States v. Kahl](#), 583 F.2d 1351 (5th Cir. 1978), which rejected this very argument.² According to [Kahl](#), an information is sufficient to charge a crime if it states the elements of the offense charged, fairly informs the defendant of the charge, and enables the defendant to plead an acquittal or conviction to bar subsequent prosecution of the same

²In [Bonner v. City of Pritchard](#), 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

offense. [Id.](#) at 1355. In [Kahl](#), the court found that the requirements were satisfied in the information in that case. [Id.](#) Here, as there, the information specifically alleged that the earnings of the defendant were sufficient to require her to file a return and that she willfully failed to do so. (Doc. 1). Here, as in [Kahl](#), the information stated all the elements of the offenses and was sufficient to notify the defendant of the offenses with which she was charged. No citation to [§ 6012](#) was necessary. [Id.](#)

III. DEFENDANT WAIVED HER RIGHT TO ARGUE THAT THE CRIMINAL INFORMATION WAS DEFICIENT IN THAT IT FAILED TO ALLEGE AN EXCEPTION IN ORDER TO GAIN THE BENEFIT OF SECTION 6531(4)'S 6-YEAR STATUTE OF LIMITATIONS FOR OFFENSES OF WILLFULLY FAILING TO MAKE A RETURN AT THE TIME OR TIMES REQUIRED BY LAW OR REGULATIONS.

The defendant contends for the first time on appeal that the information was required to allege or plead that the statute of limitation was six years. Defendant's Brief at 28. The defendant seems to also argue that, because Section 7203 is not listed specifically under [§ 6531](#), it is not covered by the 6-year limitation period provided by [§ 6531\(4\)](#). Defendant's Brief at 26. These contentions have no merit.

The defendant raises these issues for the first time on appeal. A statute of limitations defense is a challenge based on the sufficiency of the indictment that must be raised before trial, or it is waived. [United States v. Ramirez](#), 324 F.3d 1225, 1229 (11th Cir. 2003). Fed. R. Crim. P. 12(b)(3), (e). Thus, defendant

was required to raise her statute of limitation defense prior to trial, and the record reflecting that she did not do so, she has waived her right to raise it on appeal.

Defendant's claim also fails on the merits. 26 U.S.C. § 6531(4) in pertinent part states:

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years-

* * * * *

(4) for the offense of willfully failing to...make any return * * * at the time or times required by law or regulations.

Thus, the 26 U.S.C. § 7203 offenses of willfully failing to make a return charged in the information in this case fall within the 6-year exception to the 3-year statute of limitations provided by 26 U.S.C. § 6531, even though the 6-year limitation period was not mentioned in defendant's criminal information, and despite the fact that § 7203 is not referenced in § 6531. (Doc. 1). United States v. Smith, 618 F.2d 280, 281-282 (5th Cir. 1980); see United States v. Phillips, 843 F.2d 438, 442-443 (11th Cir. 1988); United States v. Porth, 426 F.2d 519, 521-522 (10th Cir. 1970); United States v. Musacchia, 900 F.2d 493, 499-500 (2d Cir. 1990).

Thus, even if the defendant had raised a statute of limitations objection by motion before trial, that objection would have had no merit.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING AS UNTIMELY DEFENDANT'S CLAIM THAT THE PAPERWORK REDUCTION ACT OF 1995 PROTECTED HER FROM 26 U.S.C. § 7203'S PENALTIES FOR FAILURE TO FILE TAX RETURNS.

The defendant contends that when "regulations" are "involved in the offense conduct of violating Section 7203," the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq. (the "PRA"), protects a defendant from criminal penalties where the information request form required by "regulations" fails to comply with the Paperwork Reduction Act. Defendant's Brief at 31. Defendant argues that she cannot be subject to any penalty because the IRS Form 1040 for 2000 through 2003, which she acknowledges contains an OMB number, fails to comply with the Paperwork Reduction Act of 1995. Defendant's Brief at 40.

Defendant raised this issue for the first time in a post-trial motion to dismiss. (Doc. 80). This claim is, in essence, an argument that defendant should not have been prosecuted for failure to file tax returns because the Paperwork Reduction Act precluded her prosecution. As such, it is a claim alleging a defect in instituting the prosecution, which was waived because it was not

raised pretrial. [See Fed. R. Crim. P. 12\(b\)\(3\)\(A\)](#).³ Under Rule 12(b)(3) the district court did not abuse its discretion in rejecting this claim as untimely. (Doc. 83).

Defendant's claim also fails on the merits. Every court that has considered the Paperwork Reduction Act, in the context of compliance with the provisions of the Internal Revenue Code, has reached the same conclusion: namely, that the Paperwork Reduction Act does not present a defense to a criminal action for failure to file an income tax return. [See United States v. Neff, 954 F.2d 698, 699-700 \(11th Cir. 1992\)](#). The court noted in [Neff](#) that the Paperwork Reduction Act provides the defendant no refuge from the statutorily-imposed duty to file income tax returns; Congress did not enact the Paperwork Reduction Act's public protection provision to allow OMB to abrogate any duty imposed by Congress. [Id.](#) Cases from other circuits support the conclusion that the Paperwork Reduction Act does not present a defense to a criminal action for failure to make a tax return, including: [Salberg v. United States, 969 F.2d 379 \(7th Cir. 1992\)](#); [United States v. Kerwin, 945 F.2d 92 \(5th Cir. 1991\)](#); [United States v. Hicks, 947 F.2d 1356 \(9th Cir. 1991\)](#); and [United States v. Wunder, 919 F.2d 34 \(6th Cir. 1990\)](#). Indeed, the Act was not intended to apply to criminal prosecutions.

³[Contra United States v. Hatch, 919 F.2d 1394 \(9th Cir. 1990\)](#) (construing a Paperwork Reduction Act defense as a claim of failure to charge an offense, which under [Fed. R. Crim. P. 12\(b\)](#) can be raised at any time during the pendency of the proceedings).

See United States v. Burdett, 768 F. Supp. 409, 412-13 (E.D.N.Y. 1991). The defendant's argument or a permutation thereof has been raised in federal district courts around the country; the response from these courts has been diverse, but no court has excused the failure to file a return on this ground. See United States v. Dawes, 951 F.2d 1189, 1191-1193 (10th Cir. 1991) and the cases cited therein.

V. THE DEFENDANT WAIVED HER RIGHT TO ARGUE THAT A TAXPAYER CAN ASSERT A FIFTH AMENDMENT PRIVILEGE TO JUSTIFY A WILLFUL FAILURE TO MAKE A TAX RETURN.

The defendant contends for the first time on appeal that the district court should have dismissed the information "as it relied upon an exercise of the defendant's remaining silence to make out the criminal claim for deprivation of liberty." Defendant's Brief at 42. According to defendant, because of "a concern for why the Internal Revenue Service does not provide information as to why they are asking and how they intend to use the answers, when and if given," she, "out of an abundance of caution," retained her information and refused to answer, by remaining silent as to any questions "on the request for 2000, 2001, 2002, and 2003." Defendant's Brief at 41-42. This argument was waived by defendant's failure to raise it prior to trial. See Fed. R. Crim. P. 12(b)(3)(A) ("a motion alleging a defect in instituting the prosecution" must be raised before trial).

Even if not waived, the district court did not plainly err in failing sua sponte to permit the defense. A taxpayer cannot assert a Fifth Amendment privilege against compulsory self-incrimination to justify the failure to file a return. [United States v. Pilcher](#), 672 F.2d 875, 877 (11th Cir. 1982); [United States v. Lacy](#), 643 F.2d 284, 285 (5th Cir., Unit B) 1981). In [United States v. Sullivan](#), 274 U.S. 259 (1927), as the Supreme Court stated: "If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all." [United States v. Sullivan](#), 274 U.S. 259, 263-264 (1927). See [United States v. Russell](#), 585 F.2d 368, 370 (8th Cir. 1978).

The defendant also argues for the first time on appeal that the district court should have held a closed hearing or should have dismissed the information as the information relied upon "an exercise of remaining silent to make out the criminal claim for deprivation of liberty." Defendant's brief at 42. This argument has no merit.

This Court has addressed a similar contention. [United States v. Vance](#), 730 F.2d 736, 737 (11th Cir. 1984). On appeal, Vance contended that this Court should reverse his conviction because the district court refused to conduct a pretrial *in camera* hearing on his claim of Fifth Amendment privilege. [Id.](#) This Court held that the district court properly refused such a hearing. [Id.](#) The Court

held that, under the facts in that case, the defendant was not entitled to any hearing at all, and he certainly was not entitled to an *in camera* hearing. See Vance, 730 F.2d at 737-738. Here, defendant's defense to the charges of failure to file a return was that she acted pursuant to a good faith understanding of the law, and was not based on a Fifth Amendment claim of privilege. (Doc. 54-8-9, 12-24). For all of these reasons, the district court did not plainly err in failing to accord defendant a Fifth Amendment privilege, barring her from prosecution on the information.

VI. DEFENDANT WAIVED HER RIGHT TO ARGUE THAT AN
INDICTMENT IS REQUIRED FOR PROSECUTION OF 26
U.S.C. § 7203 OFFENSES.

The defendant contends, again for the first time on appeal, that the Fifth Amendment requires that the charges against her be brought by way of grand jury indictment, because the district court imposed a sentence on her conviction of a total of four years imprisonment to be followed by supervised release. Defendant's Brief at 42-43. Defendant asserts that the offense of failure to file an income tax return is an "infamous crime." Defendant's brief at 43-44. Defendant waived this argument by raising it for the first time on appeal. See Fed. R. Crim P. 12(b)(3)(A).

Even if not waived, the district court did not plainly err in failing sua sponte to dismiss the criminal information, because an indictment is not required for prosecution of 26 U.S.C. § 7203 misdemeanor offenses.

In [United States v. Kahl](#), 583 F.2d 1351 (5th Cir. 1978), the defendant raised the same contentions. The former Fifth circuit in [Kahl](#) held that, since the maximum sentence for failure to file a tax return is one year under 26 U.S.C. § 7203, a person convicted of failure to file a return could not be made to serve the sentence in a penitentiary. [Kahl](#), 583 F.2d at 1355. The court went on to say that a charge of failure to file under Section 7203 does not hold a defendant to answer for an infamous crime, and does not require an indictment. [Id.](#) Moreover, as the court noted, the fact that the defendant was sentenced to one year in prison on each count of the information does not convert the offense into an infamous crime. [Id.](#) See also [United States v. Russell](#), 585 F.2d 368, 370 (8th Cir. 1978). Here, defendant was not confined in a federal penitentiary; rather, she is in custody at FCI Coleman, Medium, a federal correctional institution. Therefore, her claim is moot.

VII. THE DEFENDANT MAY SERVE HER SENTENCE IN ANY INSTITUTION DESIGNATED BY THE BUREAU OF PRISONS, OTHER THAN A U.S. PENITENTIARY, UNLESS SHE CONSENTS.

The defendant contends, as she did below at sentencing, that she cannot be ordered to serve her sentence in a "penitentiary" unless she consents under 18 U.S.C. § 4083, and that she did not consent. Defendant's Brief at 44. The defendant argues that, since she cannot be required to serve her sentence in a "penitentiary," without her consent, she cannot be confined to a

facility that houses both misdemeanants and felons. Defendant's Brief at 49. This argument has no merit.

The maximum prison sentence for failure to file a federal income tax return is one year. [26 U.S.C. § 7203](#). Therefore, pursuant to [18 U.S.C. § 4083](#), the defendant, who has been convicted of failure to file federal income tax returns, cannot be sent to serve her sentence in a penitentiary, unless she consents. See [United States v. Hanyard](#), 726 F.2d 1226, 1228 (5th Cir. 1985), citing [United States v. Kahl](#), 583 F.2d 1351, 1355 (5th Cir. 1978). Here, in the judgment in defendant's case, the district court recognized the requirements of [18 U.S.C. § 4083](#) and recommended that the Bureau of Prisons designate the federal institution, FCI Coleman, Florida, as the place of service of the defendant's sentence. (Doc. 96).

In [Hanyard](#), the defendant filed a motion for correction, reduction, modification of sentence under [Fed. R. Crim. P. 35](#). [Hanyard](#), 726 F.2d at 1228. The defendant alleged that her confinement at a federal prison camp, a facility used primarily for housing felons, was illegal because he had been convicted as a misdemeanant. [Id.](#) The court held that the purpose of Section 4083 was to prohibit confinement of misdemeanants to penitentiaries absent consent. [Id.](#) The court held that Section 4083 is not violated by confining a defendant to a federal prison camp, and, since Congress obviously contemplated some low-risk felons would be

confined to federal prison camps along with misdemeanants without violating the letter or purpose of Section 4083, the district court did not abuse its discretion by sentencing the defendant to a federal prison camp. [Id.](#)

Only eight of the Bureau of Prisons institutions are designated as United States Penitentiaries, which feature the highest security and the closest control of prisoner actions. See [United States v. Colt](#), 126 F.3d 981, 986 (7th Cir. 1997). The Department of Justice defines "institution" as a "U.S. Penitentiary, a federal correctional institution, a federal prison camp, a federal detention center, a metropolitan correction center, metropolitan detention center, a U.S. medical center for federal prisoners, a federal medical center, or a federal transportation center. 28 C.F.R. 500.1 (July 2007). See also Defendant's brief at 47. Defendant Jackson is incarcerated at a federal correctional institution, not a penitentiary.

In the event that the Bureau of Prisons were to designate the defendant to serve her sentence in a United States Penitentiary, the defendant would have the right to complain about the place of her imprisonment, unless she consents to serve her sentence in the penitentiary.

VIII. THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING SUA SPONTE TO DISMISS THE INFORMATION, BECAUSE, PROSECUTION AND TRIAL OF AN OFFENSE AGAINST THE UNITED STATES IS PROPERLY BROUGHT IN A UNITED STATES DISTRICT COURT IN A DISTRICT WHERE THE OFFENSE WAS COMMITTED.

The defendant contends for the first time on appeal that Congress has no power "in Article III or anywhere else in the Constitution of the United States" to provide for a trial of offenses against the laws of the United States, unless the alleged offense was committed "outside of any State." The defendant argues that a person charged "in any State" with any crime "shall be delivered" to the "State having jurisdiction of the crime." Defendant's Brief at 51, 56. These contentions are frivolous.

The district courts of the United States have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. [18 U.S.C. § 3231](#). Violations of Title 26, Section 7203, are offenses against the laws of the United States. [26 U.S.C. § 7203](#). The trial of offenses against the United States are required to be held in a district where the offense was committed. [Fed. R. Crim. P. 18](#). Here, the defendant was properly tried for violations of [26 U.S.C. § 7203](#) that were committed in the Northern District of Georgia. (Doc. 42 and 45).

CONCLUSION

For the above and foregoing reasons, the government respectfully requests that this Court affirm the defendant's conviction and sentence.

Respectfully submitted,

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UNITED STATES ATTORNEY

RICHARD M. LANGWAY
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States Mail a copy of same in an envelope with correct postage for delivery. This is also to certify that the foregoing document was this day uploaded to the Court's website.

Sherry P. Jackson, Reg. No. 59085-019
FCI Coleman Medium
Federal Correctional Institution
P.O. Box 1032
Coleman, FL 33521

This 9th day of June, 2008.

RICHARD M. LANGWAY
ASSISTANT UNITED STATES ATTORNEY