# UNITED STATES COURT OF APPEALS
# FOR THE THIRD CIRCUIT

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## NO. 07 – 2200

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**UNITED STATES OF AMERICA**
**Appellee**
**v.**
**ARTHUR L. FARNSWORTH**
**Appellant**

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## APPEAL FROM CONVICTION AND FINAL JUDGMENT

## CRIMINAL NO. 04 – 00707

## IN THE EASTERN DISTRICT OF PENNSYLVANIA

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# SUR-REPLY BRIEF FOR APPELLANT ARTHUR FARNSWORTH

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JONATHAN F. ALTMAN, ESQUIRE
***THE ALTMAN LAW FIRM, LLC***
380 Old Morehall Road
Malvern, PA 19355

610.647.8680 (telephone)
610.647.6520 (facsimile)
altmanlaw1@comcast.net

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## STATEMENT OF LACK OF UNDERLYING JURISDICTION

It is Appellant Farnsworth's position that the United States District Court for the Eastern District of Pennsylvania ("Trial Court") lacked territorial, subject matter and in personam jurisdiction in the matter appealed for the following reasons:

A. The Trial Court lacked territorial jurisdiction because the alleged offense did not occur on the property granted to the federal from the sovereign state of Pennsylvania.

B. The Trial Court's limited jurisdiction over offenses occurring within its exclusive legislative jurisdiction was not invoked nor established on record.

C. As no implementing regulations has been published in the Code of Federal Regulations or by statute for 26 U.S.C. § 7201 the Trial Court's limited jurisdiction over violations of federal criminal statutes does not extend to Title 26 United States Code.

D. Because the Trial Court lacked both territorial jurisdiction and subject matter jurisdiction, it lacked the in personam jurisdiction over Farnsworth.

Farnsworth challenged the Trial Court's jurisdiction on November 16, 2004 in a Motion to Dismiss Indictment that was summarily denied on November 30, 2004. (This Motion was submitted for reconsideration on December 17, 2004 and denied on December 22, 2004.); a Motion to Dismiss for lack of jurisdiction to hear criminal cases involving the internal revenue laws filed on February 22, 2005 was summarily denied on March 3, 2005; and, a Motion to Dismiss for Lack of Territorial Jurisdiction filed March, 5, 2007, summarily denied on March 7, 2007, was appealed to this Court but was voluntarily withdrawn on April 6, 2007. ***Docket*** - App. 1.

Each of these jurisdictional challenges will be fully addressed herein.

## STATEMENT OF APPELLATE JURISDICTION

In accordance with ***28 U.S.C. § 1291***, this Court has subject matter jurisdiction in a criminal case of a final judgment imposed by the Trial Court. However, should this Court find in favor of Appellant as to the Trial Court's lack of territorial, subject matter and/or in personam jurisdiction, then the April 3, 2007 final judgment imposed by the Trial Court would be a nullity and thereby strip this Court of its appellate jurisdiction. ***Final Judgment in a Criminal Case*** – App. 2.

On April 18, 2007 the Notice of Appeal was filed on the Final Judgment in a Criminal Case that disposed of all parties' claims that was imposed on April 3, 2007 and docketed April 5, 2007. The Appeal Case No. 07-2200 was assigned April 25, 2007 and the Transcript Purchase Order was entered on May 11, 2007.

## STATEMENT OF THE ISSUES PRESENTED

I. Did the Trial Court abuse its discretion and/or err as a matter of law when it adopted and instructed the Jury on a standard as to the elements of the charge of willful tax evasion from other circuits when it conflicted with the standard for the charge of willful tax evasion of this Circuit, which was established and unambiguous?

II. Did the Trial Court have proper jurisdiction to hear the case against Farnsworth despite lacking proper territorial, subject matter and in personam jurisdiction?

## STATEMENT OF THE CASE

After years of investigation and grand jury testimony, a True Bill was returned on November 4, 2004 in which three counts of Willful Tax Evasion, ***Indictment*** – App. 3, were made against Arthur Farnsworth ("Farnsworth") who was arrested on November 5, 2004, detained for three days and released on conditions and Bond in the amount of $100,000.00 that was secured by 10% cash.

Initially represented by CJA counsel, Farnsworth challenged the jurisdiction of the Trial Court through various motions to dismiss that were summarily denied. No evidentiary hearing was ever conducted on any of these motions. On June 7, 2005, retained counsel, Peter Goldberger, Esquire and Mark Lane, Esquire, entered their appearance and were granted continuance of trial until August 29, 2005. After all pre-trial motions were disposed of and all trial documents were submitted, trial was continued until December 5, 2005 when, again trial documents were submitted. On December 12, 2005, the case was specially listed for trial to commence January 30, 2006 and a related Scheduling Order was subsequently issued on December 29, 2005.

On January 27, 2006, the pre-trial conference was held in open court during which the parties' proposed voir dire and Jury instructions were discussed in detail and at length. The Trial Court directed certain legal issues inherent in the Jury

instructions to be briefed that would be addressed on January 30, 2006, the first day of trial.

Prior to Jury selection, the Trial Court informed the parties as to the instruction it intended to give regarding the offenses charged, *i.e.*, as the indictment charged Farnsworth with both methods of tax evasion, evasion of assessment and evasion of payment. Accordingly the United States of America ("the Government") had to prove the existence of an assessment, either self-assessment by Farnsworth or formal assessment by the Internal Revenue Service ("IRS") in order to establish evasion of payment. ***Colloquy*** – App. 4. After Voir dire was conducted and the Jury was selected the Government made an oral motion for reconsideration of the Trial Court's ruling as to assessment. The Trial Court after arguments denied the motion for reconsideration and the Government immediately filed a Notice of Appeal with this Court. The Jury had not been sworn and Trial was stayed over Farnsworth's objections. On February 3, 2006, the selected Jury was dismissed.

Although this Court determined it lacked subject matter jurisdiction to consider the Government's interlocutory appeal, (Docket No. 06-1425), it nonetheless issued a precedential advisory opinion as to the merits of the Government's contention that the Trial Court's ruling that proof of assessment is required in order to establish attempted evasion of payment under § 7201 is

"manifestly incorrect." ***United States v. Farnsworth***, 456 F. 3d 394, 402 (3d Cir. 2006). While this Court acknowledged the general lack of clarity in this area of law and the conflict among the Circuits, by its "own dicta", ***Farnsworth*** 456 F. 3d at 403, in ***United States v. McGill***, 464 F. 2d 222 (3d Cir. 1992) and ***United States v. McLaughlin***, 126 F.3d 130 (3d Cir. 1997), it set forth that it "cannot conclude that the District Court's proposed jury instruction was clearly erroneous." ***Farnsworth***, 456 F. 3d at 403. In fact, this Court distinguished ***Farnsworth*** from ***Wexler*** where the government appealed a proposed Jury instruction that conflicted with "the established law of this circuit." ***United States v. Wexler***, 31 F. 3d 117, 127 (3d Cir. 1994). In its Opinion, this Court dismissed the Government's appeal for lack of jurisdiction and declined to issue the writ of mandamus which the Government sought to direct the Trial Court to change its Jury instruction.

After publication of the appellate decision in August 2006, trial was scheduled to commence December 4, 2006 set forth by a Scheduling Order which was docketed October 20, 2006. On November 17, 2006, the Government filed a Motion for Reconsideration of the Trial Court's proposed Jury instruction that had been the focus of its dismissed appeal. Farnsworth opposed the Motion for Reconsideration as not only untimely but as a back door attempt to obtain the relief it was denied on appeal.

A telephone conference was held on November 29, 2006, less than a week prior to commencement of trial during which this motion was discussed. Although ***the Trial Court reiterated its reliance on the "compelling language by the Third Circuit in McGill and McLaughlin"***, ***Transcript*** – App. 5, (*Emphasis added*), and its willingness to "announce what the Court will do with respect to an attempted evasion of payment theory by way of instruction as it did before," ***Id.***, the Trial Court informed the parties that it "***will follow the law of the other circuits that have ruled directly on that issue to the effect that assessment, self-assessment or otherwise is not a necessary element to that charge, attempted evasion of payment***." ***Id.*** (*Emphasis added.*)

The Trial Court had not read Farnsworth's appellate brief on the merits of this issue but "felt compelled by Circuit IX." ***Id.*** It then sought concurrence of the parties that "on the elements of tax evasion" there is no "dispute as to what the elements are and how they should be defined herein the Third Circuit", ***Id.***, to which Defense Counsel equivocated and reserved the right to object to the Government's points for charge on the issue of evasion of payment theory. The Order granting the Government's Motion for Reconsideration was docketed the day entered, December 7, 2006, the day prior to the case being given to the Jury.

Trial commenced December 4, 2006. The Prosecution rested the afternoon of day three, December 6, 2006, at which time Farnsworth moved for judgment of

acquittal on each theory of each count. After arguments on Farnsworth's Rule 29A Motion, ***Transcript*** - App. 6, the Trial Court denied the Motion. ***Id.*** After the presentation of two defense witnesses, Farnsworth took the stand on his own behalf followed by Closing Statements. After the lunch recess, the Trial Court gave its Jury instructions. ***Transcript*** – App. 7. Farnsworth objected to four issues relating to the instructions given, including but not limited to "the inclusion of evasion of payment in the affirmative action charge" and "in the separate instruction on that subject, and in several other places where the words, or payment were inserted." ***Id.***

Within one and a half hours of deliberation, the Jury returned a verdict of guilty as to ass three counts of the indictment finding Farnsworth willfully attempted to evade and defeat income tax due and owing to the United States of America for calendar years 1998, 1999 and 2000. ***Transcript*** – App. 8. The Jury further found Farnsworth guilty of both evasion of assessment and evasion of payment. ***Transcript*** – App. 9. The verdict of guilty was entered, ***Id.***, the Jury was discharged, ***Id.***, and Farnsworth was released under the same bond and conditions as were in place before trial until sentencing.

In the interim between conviction and sentencing, Farnsworth retained additional counsel for the limited purpose of filing a Motion to Dismiss for Lack of Territorial Jurisdiction that was filed on March 5, 2007. Thereafter on March 7,

2007 without a Brief in Opposition by the Government the Motion was summarily denied, sentencing was continued until April 3, 2007 at which time the final judgment from which this Appeal is taken was entered.

## STATEMENT OF FACTS

### JURY INSTRUCTIONS AS TO EVASION OF ASSESSMENT AND EVASION OF PAYMENT WAS CONTRARY TO THIRD CIRCUIT LAW

***It is an undisputed fact that there had been no self-assessment by Farnsworth who had not filed any tax returns for the years set in the indictment, 1998, 1999 and 2000 or that no formal assessments had been prepared for those periods of time by the IRS. Transcript*** – App. 16. While the Trial Court had held that the indictment properly charged the willful attempt to evade assessment and payment of taxes, ***Transcript*** – App. 17, the disputed issue was whether the law in the Third Circuit required an assessment for there to be evasion of payment. ***Id.***

On January 30, 2006 prior to commencing trial, the Trial Court announced that

> "***We're bound by the law of the Third Circuit*** and if there's any weakness in the reasoning we'll leave that for the government to argue directly to the Court of Appeals. But ***we do rule that evading payment does require in the Third Circuit an assessment, either self assessment or assessment by the Internal Revenue Service.***" (*Emphasis added.*) ***Transcript*** – App. 18.

The Government immediately sought a Writ of Mandamus of this Court to change its previous decisions on this issue and thereby mandate the Trial Court to instruct the Jury according to otherwise non-binding Ninth and other Circuit law.

***Farnsworth***, *supra*. This Court dismissed the appeal for lack of jurisdiction and declined to issue the writ but issued an unwarranted advisory opinion on the merits of the Government's appeal as to the issue of assessment. ***Id.***

Despite finding that the Trial Court had committed no clear error in its decision to instruct the Jury in accordance with what had been deemed dicta of this Court, the Government sought the Trial Court's reconsideration of its January 30, 2006 ruling, *supra*. This request was discussed in a telephone conference call on November 29, 2006 and decided in the Government's favor despite vigorous and substantive objections raised by Farnsworth. ***App. 5***. The Trial Court adopted the standard of other circuits and instructed that,

> "***When a tax payer fails to file a return***, the ***Government can show tax liability pursuant to the provisions of the tax code***, then a ***tax deficiency*** within the meaning of the tax law ***is deemed to arise by operation of law on the date of the return, that's April 15th the following year.***
>
> Therefore***, should you find that Mr. Farnsworth failed to file a tax return*** for any year involved in this indictment, ***and you find that the Government has shown Mr. Farnsworth had a tax liability pursuant to the provisions of the tax code***, ***there is no need for the Government to additionally prove*** any administrative ***proceedings or undertaking to formally assess the tax deficiency***. In such case, the ***willful failure to evade the payment of the tax is sufficient***." (*Emphasis added.*) ***App. 7.***

The Trial Court crafted the verdict slip in conformity with the law of other circuits that reflected the instruction to the Jury that,

> "... there are two methods by which the Government may prove to find a charge of attempted willful tax evasion beyond a reasonable doubt. The Government may show either that Mr. Farnsworth willfully attempted to evade or defeat the assessment of the tax, that's one way, or the Government may show that Farnsworth willfully attempted to evade or defeat the payment of the tax. You, the jury, ***must unanimously agree on which of these two methods the Government has proven beyond a reasonable doubt***, if any, for each count listed in it [sic] the indictment." ***App. 7***, *supra.* (*Emphasis added.*)

Thus, the verdict slip required the Jury to determine whether Farnsworth attempted to evade assessment and/or attempted to evade payment of taxes due and owing. When the verdict was rendered and the Jury polled, its decision as to guilt of evasion of assessment and evasion of payment was elicited.

## TRIAL COURT LACKED TERRITORIAL JURISDICTION

The Trial Court is a court of limited jurisdiction as are all federal courts. ***28 U.S.C. §§ 1330*** *et seq.* The indictment under which Farnsworth was prosecuted and convicted did not specifically state where the alleged violations of ***26 U.S.C. § 7201*** (***"§ 7201"***) occurred. Rather, it alleged that the offenses occurred "within the Eastern District of Pennsylvania." ***App. 3***, *supra*. The judicial district of any particular federal court is the federal territory within that district. ***28 U.S.C. § 3002(15) (A)***; ***19 C.J.S. § 883.*** According to ***Chapter Five, 28 U.S.C. §§ 81-131,*** and particularly ***Section 118*** pertaining to Pennsylvania, and the ***Historical and Revision Notes of Chapter 5 of 28 U.S.C.,*** the ***territorial composition of the districts*** and divisions of the United States district courts is the ***federal territory within the named counties*** comprising the districts and divisions, subject to the exclusive legislative power of Congress as of January 1, 1945.

Despite Farnsworth's substantive and extensive memorandum of law in support of his motion to dismiss the action for lack of exclusive territorial jurisdiction for which he had retained additional counsel who had had no involvement in the case in chief, the motion was summarily denied. ***App. 11.*** Farnsworth filed an appeal of this decision prior to sentencing but withdrew the appeal to appease Farnsworth's Trial Counsel who was preparing for

Farnsworth's sentencing.

## TRIAL COURT LACKED SUBJECT MATTER JURISDICTION

As stated by Farnsworth in his February 2005 pro se Motion to Dismiss, the Trial Court did not have criminal jurisdiction for actions involving internal revenue. While **18 U.S.C. § 3231** designates the district courts with original jurisdiction of all offenses against the laws of the United States, all such offenses are codified in Title 18 of the United States Code.

Pursuant to **18 U.S.C. § 3231** district courts are granted original jurisdiction over the laws of the United States. *See* ***Historical and Revision Notes, Chapter 5 of Title 28 of the United States Code***. The judicial district of any particular federal court is the federal territory within that district. ***28 U.S.C. § 3002(15)(A)*** and ***19 C.J.S. § 883 (2007)***. According to Chapter Five, **28 U.S.C. §§ 81-131**, particularly Section 118 pertaining to Pennsylvania and the Historical and Revision Notes of Chapter 5 of Title **28 U.S.C**., the territorial composition of the districts and divisions of the United States district courts is the ***federal territory within the named counties comprising the districts and divisions***, subject to the exclusive legislative power of Congress as of January 1, 1945.

Farnsworth was convicted of violating **§ 7201**, a criminal penalty statute under the internal revenue laws and not an offense statute, *i.e.*, until Title 18.

Title 26 specifically establishes the jurisdiction of the district courts of the United States as limited to ***civil actions***, to wit:

> (f) General jurisdiction. – For ***general jurisdiction of the district courts of the United States*** in ***civil actions involving internal revenue***, see section 1340 of title 28 of the United States Code. (*Emphasis added.*) ***26 U.S.C. § 7402 (f)***.

The district courts are empowered by **28 U.S.C. § 1340** with

> … original jurisdiction of ***any civil action arising under*** any Act of Congress providing for ***internal revenue***, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade. (*Emphasis added.*) ***Id***.

Despite Farnsworth's challenge of this Court's jurisdiction for these reasons, the Trial Court cited ***United States. v. Isenhower***, 754 F.2d 489 (3d Cir. 1985), as the authoritative basis for its denial of Farnsworth's motion. ***App. 10***. ***Isenhower*** stands for the proposition that the court derives its jurisdiction to hear cases involving criminal violations of the Internal Revenue laws from the constitutional authority of the federal government to impose taxes under the 16th Amendment. ***Isenhower***, 754 F.2d at 490. Farnsworth challenges this reasoning as inconstant with constitutional and statutory authority by which the district courts are created and the limited jurisdiction imposed on these courts to hear particular types of cases and controversies.

The issue is not whether Congress has the power to lay taxes, ***Hershey Chocolate Co v. McCaughn***, 42 F. 2d 408, 412 (3d Cir. 1930); or even the power to criminalize violations of Internal Revenue laws, ***United States - Bousley v. U.S.***, 523 U.S. 614 (1998); but rather, whether the Trial Court was empowered by Congress, by statute or the constitution, to hear and pass judgment on Farnsworth for an offense that arose under the Internal Revenue laws that carried a criminal penalty and not any criminal offense statute.

Without jurisdiction to hear criminal tax cases specifically conferred by statute or the constitution, the Trial Court exceeded its authority and sat in judgment of Farnsworth in violation of his fundamental, enumerated and un-enumerated constitutional rights. The resulting conviction must be vacated without remand.

## SUMMARY OF ARGUMENTS

Farnsworth appeal is based on two general areas of contention, one of which involves the Trial Court's discretion in the case in particular the Jury instructions as to the requisite elements of willful tax evasion as established by this Court.

The second contention involves jurisdictional deficiencies of a fundamental nature that rendered the convictions null and void.

# ARGUMENT

## I. THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW IN ITS INSTRUCTIONS TO THE JURY WHICH DEVIATE FROM THE UNAMBIGUOUS, ESTABLISHED LAW OF THIS CIRCUIT.

### A. The Trial Court erred in its Jury instructions by failing to use precedent of this Circuit that requires the Government to show proof of assessment as an element to convict on an evasion of payment theory.

**Standard of Review**

This Court reviews for abuse of discretion when a party makes a timely objection to Jury instructions. ***Cooper Distr. Co. v. Amana Refrigeration Inc.***, 180 F. 3d 542, 549 (3d Cir. 1999).

There are many facets to Farnsworth's contention of flawed Jury instruction on the elements of the offense charged under standards of another appellate court other than this Circuit, when this Court's standard is established, unambiguous and conflicts with the standard relied upon by the Trial Court. Central to the decision to use non-binding authority is whether the opinions stated in ***United States v. McGill***, 964 F.2d 222 (3d Cir. 1992), and ***United States v. McLaughlin***, 126 F.3d 130 (3d Cir. 1997), constitute dicta, as described by this Court therein. ***Farnsworth***, 456 F.3d at 403.

Following the doctrine of stare decisis, this Court is bound by previous decisions from cases before it. While it is bound by the holding of the previous cases, dicta are not binding. "**Dicta**" is defined as ***opinions*** of a judge ***which do not embody the resolution or determination of the specific case before the court***. *(Emphasis added.)* ***Black's Law Dictionary*** 485 (8th ed. 2004). Conversely, a "**Holding**" refers to a ***court's determination of a matter of law pivotal to its decision or a principle drawn from such a decision***. ***Id.*** at 749. While the Government argues the requisite element of proof of assessment is only found in dicta in ***McGill*** and ***McLaughlin***, the decisions in these cases were pivotal and necessarily binding.

The elements of the felony of attempted evasion of payment of tax under **26 U.S.C. § 7201** are three: 1) the existence of a tax deficiency, 2) an affirmative act constituting an attempt to evade or defeat payment of the tax, and 3) willfulness. ***Sansone v. United States,*** 380 U.S. 343, 351 (1965). In ***McGill***, this Court defined an affirmative act as encompassing two distinct behaviors: evasion of assessment and evasion of payment. ***McGill***, 964 F.2d at 229. For evasion of assessment, the affirmative act required is satisfied with the filing of a false return. ***Id.*** If the false failing is shown to be willful, the offense is complete with the filing. ***Id.*** Evasion of payment, on the other hand, occurs after filing, if there is filing at all. ***Id.*** Evasion of payment "involves ***conduct*** designed to place assets beyond the government's

reach ***after*** a tax liability has been ***assessed***."(*Emphasis added.*) ***Id.*** (*quoting*, ***United States v. Mal***, 942 F.2d 682, 687 (9th Cir.1991)). After defining the law for this Circuit, this Court reversed McGill's convictions on counts 7 and 8 for insufficient evidence of affirmative acts of evasion [of payment] during the relevant period. ***McGill,*** 964 F.2d at 235. Further, this Court stated there was no evidence of fraudulent payments and if such payments existed, they should have been produced. ***Id.***

Turning to ***McLaughlin*** where two brothers were convicted of tax crimes, one brother having his conviction overturned and the other having his sentence vacated. This Court cited to ***McGill*** in its discussion of the elements for proof of evasion of payment versus evasion of assessment. ***McLaughlin***, 126 F.3d at 136. Applying the distinctions set forth, this Court stated: "Had the Government charged the McLaughlin's with evasion of payment, it would have had to prove a valid assessment from which the McLaughlin's hid assets." ***Id.*** at 136 *citing* ***United States v. England,*** 347 F.2d 425, 430 (9th Cir 1965). Because it was clear from the start of the trial that the Government was preceding on an evasion of assessment theory, the Government need only prove in conduct relevant to an evasion of assessment theory. ***Id.***

As evasion of payment was not included as a theory by the prosecution in ***McLaughlin***, this Court's comment about proof of assessment being an element of

evasion of payment, this constitutes persuasive dicta, albeit not binding. However, it is not a mere rambling or mistake by this Court. It was stated because this Court in ***McGill*** did follow this rule. The decision in ***McGill***, which reversed convictions on counts 7 and 8 because there was no evidence of an affirmative act required to support a charge for evasion of payment, is indeed part of the holding and, thus, is binding in this Circuit and on the Trial Court.

In this instant case, rather than confirming the Jury instructions upon which it had originally intended after this Court's dismissal of the Government's appeal, the Trial Court relied on pure dicta from ***Farnsworth,*** 456 F.3d 394, 403 (3d Cir. 2006) and changed the Jury instruction on the elements of the offense, excluding the necessary element of proof of assessment. While the Trial Court erred in relying on non-binding dicta, in the same stroke they neglected to adhere to binding precedent in ***McGill***, resulting in great detriment to Farnsworth. The Government, in an attempt to minimize the effect of ***McGill*** and ***McLaughlin***, stated that the issue of proof of assessment must be read in light of the Supreme Court's explanation that payment is due regardless of an assessment. ***Baral v. United States***, 528 U.S. 431, 437 (2000). However, simple non-payment ***alone*** is not enough to convict under **§ 7201**. ***United States v. Voigt***, 89 F.3d 1050, 1090 (3d Cir. 1996). What is more, under the Internal Operating Procedures of this Circuit, one panel may not over-rule a decision of a previous panel. **3d Cir. I.O.P. 9.1**

**(2008).** Only this Court sitting ***en banc*** may do so. ***Id.;*** *see also* ***United Artists Theatre Circuit, Inc. v. Township of Warrington,*** 316 F.3d 392, 404 (3d Cir. 2003).

The Trial Court's final Jury instruction was, therefore, not reasonable, lawful and not within its discretion.

### B. The error in Jury instructions for evasion of payment is not harmless, but rather incurably prejudicial as it had a direct affect on the outcome of the verdict to the detriment of Mr. Farnsworth

**Standard of Review**

Where the question is whether the Jury instructions failed to state the proper legal standard, this Court's review is plenary. ***United States v. Flores***, 454 F.3d 149 (3d Cir. 2006). An error is harmless where the Government established beyond a reasonable doubt that the error complained of did not contribute to the verdict. ***United States v. Henry***, 282 F.2d 242, 251 (3d Cir. 2002). However, such can not be said here.

The Government claims Farnsworth's assertion that the Jury instructions where flawed are baseless. Farnsworth argues that the verdict would have been substantially different if the Jury instructions would have based upon precedent of this Court and are, therefore, not baseless, but rather meritorious. Although the Government claims that: 1.) Farnsworth was convicted of evasion of assessment

anyway so the instruction was harmless error at best, and 2.) the Trial Court's instruction about evasion of payment was correct. Both contentions by the Government are intolerably defective as the error resulted in the gross miscarriage of justice.

**Discussion**

The fact that Farnsworth was convicted of evasion of assessment is irrelevant to the fact that the Jury instruction was harmless as Farnsworth would not have been convicted under the proper Jury instruction for this Circuit. As previously stated, ***the correct law for this Circuit to be guilty of evasion of assessment requires the defendant to file a false tax return for the period of time in question***. ***McGill***, 964 F.2d at 229. Again, this is not mere dicta from ***McGill***, it was essential to the reasoning in the court's decision and, thus, part of the binding holding. However, the Government claims it is "ironic" that Farnsworth relies on dicta from ***McLaughlin,*** which captures the posture of the present case. The Government is mistaken. Farnsworth notes the statement of law in ***McLaughlin***, however distinguishes the present case from it.

In ***McLaughlin*** the court made it very clear that the Government was proceeding with an evasion of assessment theory to convict the defendants. ***Id.,*** 964 F.2d at 136. It is not the contention of Farnsworth that the ***McLaughlin*** case was flawed. To the contrary, as the defendants had filed a tax return for the period

of time in question, the Government in that case could properly make the claim of evasion of assessment in that case. In the present case, these are not the facts. Farnsworth did not file a false return as the defendants in ***McLaughlin*** had done. Farnsworth cites to ***McLaughlin*** for the statement of law in this Circuit. Indeed, ***McLaughlin*** cites to the holding in ***McGill***. Farnsworth would have needed to file a false returns in each year of 1998-2000 to properly be convicted under **§ 7201** under a theory of evasion of assessment. Farnsworth did not file a return for any of the three years in question. Therefore, the Jury could not have convicted him under an evasion of assessment theory in this Circuit.

The Trial Court's instruction regarding evasion of payment was not correct either. The Government claims that the Trial Court properly declined to instruct the Jury that proof of evasion of payment requires proof of assessment because the weight of authority from the sister circuits does not require proof of assessment. This is flawed logic as this Court has declared that proof of assessment is required to convict for evasion of payment under **§ 7201.** ***McLaughlin***, 126 F.3d at 136; ***McGill***, 964 F.2d at 229; *see also,* ***England,*** 347 F.2d at 430 (stating a valid assessment is required to prove evasion of payment). The Government never presented proof of either a self-assessment or an official assessment prepared by the IRS. Without this, Farnsworth could not be convicted under an evasion of payment theory.

***In sum, to be convicted in this Circuit under* § 7201 *the Government must show an affirmative act of evasion other than mere non-payment.*** An affirmative act may be an evasion of assessment which requires filing a false return or an evasion of payment which requires proof of assessment. Farnsworth did not file returns for the subject years so he could not have evaded assessment, nor did the Government show proof of assessment so Farnsworth could not have evaded payment. If the Jury instructions would have properly stated the law as it stands in this Circuit, Farnsworth would not have been convicted under **§ 7201**. Because of the incorrect Jury instruction, which manifestly prejudiced Farnsworth, the verdict was adversely affected. Therefore, the error was not harmless. Thus, Farnsworth asks this Court to vacate the verdict without remand.

## II. THE TRIAL COURT LACKED JURISDICTION OVER CRIMINAL OFFENSES FOR 26 U.S.C. § 7201.

### A. The Trial Court proceeded without proper territorial jurisdiction to hear the case.

**Standard of Review**

The standard of review of a jurisdictional decision is plain error. An error below exists only is it was (1) clear or obvious, (2) affect[ed] substantial rights, and (3) seriously affect the fairness, integrity or public reputation of juridical proceedings. ***Nara v. Frank***, 488 F.3d 187, 197 (3d Cir. 2007) *quoting* ***United States v. Olano***, 507 U.S. 725, 732, 734 (1993) (*citation omitted*).

**Discussion**

The Government claims that because territorial jurisdiction is not an "element" of tax evasion, the Trial Court did not need territorial jurisdiction to hear the case. *Brief for Appellee at 25.* However, despite their bantering, the Government failed to properly address this issue: whether the Government had proven territorial jurisdiction needed to try the case. After all, proper jurisdiction for any court to try a case is always a necessary "element."

Federal courts have limited jurisdiction and the scope of its jurisdiction is defined by the legislature. Exclusive legislative jurisdiction is required for a federal court to possess jurisdiction to adjudicate criminal offenses. Without cession of jurisdiction to the federal government from one of the sovereign states of the Union and written acceptance of the jurisdiction, the jurisdiction of the federal

government and its courts is restricted to adjudication of claims on its proprietary interest. **18 U.S.C. § 7(3)** provides:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes: . . . (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or ***other needful building.*** (*Emphasis added.*)

As is readily apparent, this subsection, and particularly its second clause, bears a striking resemblance to Article I, § 8, Clause 17 of the Constitution. This Clause provides:

> The Congress shall have power . . . ***To exercise exclusive Legislation in all Cases whatsoever***, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority ***over all Places purchased by the Consent of the legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.*** (*Emphasis added.*)

The constitutional phrase "exclusive legislation" is the equivalent of the statutory expression "exclusive jurisdiction." *See* ***James v. Dravo Contracting Co.***, 302 U.S. 134, 141 (1937) *citing* ***Surplus Trading Co. v. Cook***, 281 U.S. 647, 652 (1930).

The Government accuses Farnsworth of pulling a "bait-and-switch," claiming that territorial jurisdiction is only relevant to maritime or to military crimes. However, this is incorrect and misleading. It is a long-standing maxim of law that district courts have jurisdiction of offenses occurring only within the "United States" pursuant to ***18 U.S.C. § 3231.*** For example, in ***United States v. Unzeuta***, the Supreme Court reversed the Eighth Circuit's holding that the U.S. had no jurisdiction over a murder committed in a railroad car at Fort Robinson as the state cession statute was misconstrued as not including railroad rights-of-way. 281 U.S. 138 (1930). Moreover, ***Dravo*** settled that the phrase "other needful buildings" was not to be strictly construed to include only military and naval structures, but was to be construed as "embracing whatever structures are found to be necessary in the performance of the function of the Federal Government." *See* ***Dravo***, 302 U.S. at 142-43. It, therefore, properly embraces courthouses, customs houses, post offices and locks and dams for navigation purposes.

The Trial Court's failure to consider the merits and the law in support of Farnsworth's Motion to Dismiss for lack jurisdiction meets the standard of plain error in that the error was clear, obvious and manifestly affected Farnsworth's rights to his great prejudice. Had the Trial Court abided by its ministerial duty by pursuing the inquiry of territorial jurisdiction by way of an evidentiary hearing or argument, it is reasonable to expect that it would have determined that the United

States, as the plaintiff, had failed to establish the territorial jurisdiction upon which Farnsworth was prosecuted such that the verdict is void. The Trial Court's mishandling of Farnsworth's Motion to Dismiss seriously affected the fairness and integrity of the proceedings and if publically known would undermine the public's confidence in the judicial process.

As the Trial Court proceeded without territorial jurisdiction, it also lacked subject matter and in personam jurisdiction. Therefore, the judgment must be vacated. Accordingly, Farnsworth seeks the conviction vacated without remand.

### B. The Trial Court did not have proper subject matter jurisdiction to hear a criminal case under 26 U.S.C § 7201

**Standard of Review**

The applicable standard for a claim that the Trial Court lacks subject matter jurisdiction is a *de novo* review of the Trial Court's interpretation and application of the statutory provisions concerning the court's subject matter jurisdiction, ***Alaka v. AG of the United States***, 456 F. 3d 88, 94 n.8 (3d Cir. 2006), and a review for clear error of the Trial Court's factual findings with respect to jurisdiction. ***United States v. Isaza-Zapata***, 148 F. 3d 236, 237 (3d Cir. 1998).

**Discussion**

The Government claims that because Farnsworth is accused of violating a federal offense, the Trial Court has jurisdiction over the issue. *Brief for Appellee at 21.* They further claim that he "acknowledged" the Trial Court had subject matter jurisdiction over the case which is neither true nor relevant because subject matter jurisdiction can be raised at anytime and is cannot be waived.

It is well established that subject matter jurisdiction is "the court's statutory or constitutional power to hear a case." ***United States v. Cotton***, 535 U.S. 625, 630 (2002) *quoting* ***Steel Co. v. Citizens for Better Env't***, 523 U.S. 83, 89 (1998). Defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court as this jurisdiction cannot be forfeited or waived. ***Id.*** "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." ***Local 1498, Am. Fed'n of Gov't Emp. v. Am. Fed'n of Gov't Emp., AFL/CIO***, 522 F. 2d 486, 492 (3d Cir. 1975) *quoting* ***Ex parte McCardle***, 74 U.S. (7 Wall.) 506, 514. (1868).

Long ago the Supreme Court addressed the question "whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases." ***United States v. Hudson and Goodwin***, 11 U.S. 32 (1812). This opinion, while short is very relevant to Farnsworth's position that the Trial Court was

devoid of subject matter jurisdiction to consider the Government's allegation of three counts of income tax evasion and is therefore incorporated herein by reference and attached hereto as ***App. 19***. The Supreme Court considered the issues as having been "long since settled in public opinion" and that the course of reasoning to support the conclusion "in favor of the negative of the proposition," is "simple, obvious, and admits …

> Of all the Courts which the United States may, under their general powers, constitute, ***one only, the Supreme Court***, ***possesses jurisdiction derived immediately from the constitution***, and of which the legislative power cannot deprive it. ***All other Courts*** created by the general Government ***possess no jurisdiction but what is given them by the power that creates them***, and can be vested with none but what the power ceded to the general Government will authorize them to confer." ***Hudson and Goodwin***, 11 U.S. at 33.

The Supreme Court held that,

> "… all exercise of criminal jurisdiction in common law cases we are of opinion is not within their [federal courts'] implied powers. ***Id.***

This decision is based on the fact that,

> "… it is enough that such jurisdiction [criminal in common law cases] has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation." ***Id.*** at 32.

While Congress created the power to tax by the constitution and certain

related statutes found in **Title 26** and **Title 27** of the United States Code, it also created the federal court system and established the limits of the subject matter jurisdiction of each court. Nowhere in **Title 28** that governs the Judiciary and Judicial Procedure, Title 18 that governs Crimes and Criminal Procedure or **Title 26** for that matter are the district courts[1] given the power to hear criminal tax cases. In fact, **Title 18** and **Title 26** expressly empower the district courts to hear civil actions pertaining to the Internal Revenue laws. ***18 U.S.C. § 1340*** and ***26 U.S.C. § 7402(f)***. The absence of statutory authority to hear a certain type of case coupled with an undisturbed Supreme Court holding that makes common law jurisdiction of criminal cases unavailable to the district courts renders the Trial Court without subject matter jurisdiction to hear the Government's prosecution of Farnsworth for violation of **§ 7201** and impose a criminal penalty upon conviction.

Moreover, the indictment against Farnsworth failed to state an offense such that the Trial Court lacked subject matter jurisdiction. As previously stated, the indictment cited **§ 7201** as the statute Farnsworth has been accussed of violating. However, the indictment does not specify any regulations that empower and implement this statute. To be convicted under cited statute, it must be published in the Federal Register, which it is not. **44 U.S.C. § 1505** states:

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[1] *See* the Argument regarding territorial jurisdiction for further discussion of the territorial limitations of the federal courts and what constitutes the "United States."

> **"§1505 Documents to be published in the Federal Register**
>
> (a) Proclamations and Executive orders; ***documents having general applicability and legal effect***; documents required to be published by Congress. There shall be published in the Federal Register …
>
> For the purpose of this chapter ***every document or order which prescribes a penalty has general applicability and legal effect***. (*Emphasis added.*)

Furthermore, ***26 U.S.C. § 7805, Rules and regulations***, provides in part that:

> (a) "***the Secretary shall prescribe all needful rules and regulations for the enforcement of this title*** . . . ." (b)(1) "***file such regulation with the Federal Register***, issue such regulation to the public . . . ." and (c) "prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue." (*Emphasis added.*)
>
> and
>
> (b)(1) "In general . . . no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest . . . date on which such regulation is filed with the Federal Register, . . . or the date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public. . . ." Except regarding (b)(5) "internal regulations, (these time limits) shall not apply to any regulation relating to internal Treasury Department policies, practices, or procedures."

According to ***44 U.S.C. § 1505*** and ***26 U.S.C. § 7805***, in order for the

Government's prosecution of Farnsworth under ***§ 7201*** to withstand appeal, the Title and particular statute Farnsworth was convicted of violating must be published in the Federal register. A search of the Federal Register has uncovered no such publication. On its face, Farnsworth's conviction under Counts 1 through 3 of the Indictment must be vacated as prosecution under a statute that prescribes a penalty without an implementing regulation would violate ***44 U.S.C. § 1505*** and ***26 U.S.C. § 7805***.

The mandate for implementing regulations is recited in Internal Revenue Service procedural regulations at ***26 C.F.R § 601.702(a)*** that regulates the publication and public inspection of the Federal Register, to wit:

> Subject to the application of the exemptions described in paragraph (b)(1) of § 601.701 and subject to the limitations provided in subparagraph (2) of this paragraph, ***the Internal Revenue Service is required*** under ***5 U.S.C. § 552(a)(1) to separately state and currently publish in the Federal Register*** for the guidance of the public the following information:
>
> (i) Descriptions of its central and field organization and the established places at which, the persons from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions, from the Service;
>
> (ii) ***Statements of the general course and method by which its functions are channeled and determined***, including the nature and requirements of ***all formal and informal procedures*** which are available;

> (iii) ***Rules of procedure***, descriptions of forms available or the places at which forms may be obtained, and ***instructions*** as to the ***scope and contents of all papers, reports, or examinations***;
>
> (iv) ***Substantive rules of general applicability adopted as authorized by law***, and statements of general policy or interpretations of general applicability formulated and adopted by the Service; and
>
> (v) ***Each amendment, revision, or repeal of matters referred to in subdivisions (i) through (iv) of this subparagraph***. (*Emphasis added.*)

Like ***44 U.S.C. § 1505*** and ***26 U.S.C. § 7805***, ***26 C.F.R § 601.702(a)*** safeguards the public from being adversely affected by rules that have general applicability. Therefore, the Government violated all three statutes in its prosecution of Farnsworth as he has most certainly adversely affected thereby having been sentenced to imprisonment and branded a felon for the rest of his life. Additionally, because the Trial Court lacked territorial jurisdiction and subject matter jurisdiction, it necessarily lacked in personam jurisdiction over Farnsworth.

The Trial Court erred as a matter of law in denying Farnsworth's Motion to Dismiss to his great detriment and prejudice. Proceeding inspite of sound challenge to its subject matter jurisdiction undermines public confidence in the integrity of the judiciary. The Trial Court had a duty to seriously consider the merits of Farnsworth's Motion to Dismiss for lack of criminal jurisdiction. The statutory and constitutional authority to lay taxes and criminalize violations of the Internal

Revenue laws with Congressional authority to devise the federal judicial system and define those limited matters each type of court therein is empowered to hear is a woefully inadequate basis upon which to ignore basic tenets of jurisprudence and black letter law and summarily deny Farnsworth's motion.

The Trial Court proceeded without subject matter jurisdiction such that the conviction and sentence must be vacated without remand as this jurisdictional error cannot be remedied.

## CONCLUSION

Wherefore, Farnsworth's conviction and sentence should be vacated without remand.

*Respectfully submitted,*
***THE ALTMAN LAW FIRM, LLC***

Date: May 29, 2008

By: /s/ Jonathan F. Altman, Esquire
JONATHAN F. ALTMAN, ESQUIRE
Counsel for Appellant
***ARTHUR L. FARNSWORTH***

380 Old Morehall Road
Malvern, Pennsylvania 19355
610.647.8680
610.647.6520 fax

## COMBINED CERTIFICATIONS

### I. Bar Membership

I, Jonathan F. Altman, Esquire hereby certify that I am the attorney whose name and electronic signature appear on this Sur-Reply Brief of Appellant, Arthur L. Farnsworth and am a member of the Bar of this Court.

### II. Word Count

I, Jonathan F. Altman, Esquire hereby certify that the net word count of this Sur- Reply Brief of Appellant, Arthur L. Farnsworth, is 7,519 minus cover page, tables of contents and authorities.

### III. Service Upon Counsel

I, Jonathan F. Altman, Esquire hereby certify that the E-Brief of Appellant, Arthur L. Farnsworth was served on this Court in PDF format by email to electronic_briefs@ca3.uscourts.gov on the 29th day of May, 2008.

I, Jonathan F. Altman, Esquire hereby certify that 10 copies of this Sur-Reply Brief of Appellant, Arthur L. Farnsworth including addenda were served on this Court by First Class Mail on the 29th day of May, 2008.

I, Jonathan F. Altman, Esquire hereby certify that one copy of this Sur-Reply Brief of Appellant, Arthur L. Farnsworth, was served on opposing counsel, Joseph J. Khan, Esquire, Assistant United States Attorney, Office of the United States Attorney, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106 and Robert A.

Zaumer, Esquire, Chief of Appeals, Office of the United States Attorney, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106 on the 29th day of May, 2008

**IV. Identical Compliance of Briefs**

I, Jonathan F. Altman, Esquire hereby certify that the text of the PDF file and Hard Copy of this Sur-Reply Brief of Appellant, Arthur L. Farnsworth are identical.

**V. Virus Check**

I, Jonathan F. Altman, Esquire hereby certify that this Sur-Reply Brief of Appellant, Arthur L. Farnsworth was scanned for viruses using Symantec Anti-Virus software. The PDF file is automatically scanned as an attachment to email sent through Microsoft Outlook via mail.comcast.net using the embedded software provided by comcast.net.

Subscribed this 29th day of May, 2008.

By: /s/ Jonathan F. Altman
JONATHAN F. ALTMAN, ESQUIRE
Counsel for Appellant
***ARTHUR L. FARNSWORTH***

380 Old Morehall Road
Malvern, Pennsylvania 19355
610.647.8680
610.647.6520 fax