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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

10	UNITED STATES,) No. CR-00123-RRB-JDR
11	PLAINTIFF,)
12) DEFENDANT'S MOTION TO DISMISS
13	vs.) Counts 1, and 3-6 of indictment for lack of
14) <i>in personam</i> jurisdiction, essential elements;
15) operation of 26 USC § 83 as previously briefed.
16	Eugene George Warner,)
17	Defendant.)

I. INTRODUCTION.

1.1 COMES NOW, Defendant above named, seeking specific relief in the form of dismissal of Counts 1, 3, 4, 5, and 6, of the indictment in this case, which point to Defendant's pension payments as gross income. As is the case in relation to many other statutory arguments of which this Court is now aware, the argument made herein is one with perhaps the longest string of controversy behind it as it concerns the wall between Americans and their law upon which the Plaintiff relies in every tax case wherein these arguments are encountered; Plaintiff will fail.

1.2 This issue is as strictly founded upon statutory language and interpretation as one can find in any other case. The way such language is applied to fact by the Plaintiff is diametrically opposed to the Plaintiff's arguments in four U.S. S.Ct. victories where it argued

1 precisely as will the Defendant but in relation to a tax statute; “any” means everything. **Any**
2 **and all emphasis** employed herein may be construed to have been added.

3 1.3 Defendant’s memorandum on his 26 USC § 83 claim is found at his Offer of Proof
4 filed 11/25/08 (hereinafter “OP”) at its Ex.5 which is an 18 USC § 4 complaint to which he is a
5 similarly situated complainant by virtue of his affidavit of joinder filed thereunder. (See OP at
6 Ex.6, aff. of joinder filed w/Congress 8/27/06). Inside OP Ex.5 is a 58 pg. memorandum which
7 states Defendant’s 26 USC § 83 claim at its pp.25-35. Authorities cited therein relevant to due
8 process and to applicable provisions of 26 USC, as well as the statement of the § 83 claim at
9 pp.25-35 of 58, are incorporated by this reference as if fully restated herein. Defendant will
revisit in short the claim stated in said memorandum.

10 II. ISSUE: Defendant has been deprived of the provisions
11 of 26 USC §§ 83, 212, 1001, 1011, and 1012.

12 2.1 The amounts Plaintiff claims are gross income in Counts 1, 3, 4, 5, and 6 of the
13 indictment are property received in exchange for services. “Section 83(a) explains how
14 property received in exchange for services is taxed.”¹ Section 83 applies to all compensation
15 paid for services of corporations, and for the services of individuals.² Labor is Property.³

16 2.2 With plain language § 83(a) requires that, when compensation is received in
17 [exchange] for services, from the FMV of the compensation, the excess over the “amount paid”
18 (cost) is to be included in gross income.

19 § 83 “Property Transferred in Connection with the Performance of Services.

20 (a) If, in connection with the performance of services, property is transferred...,
the excess of-

21 (1) the fair market value of such property...**over,**

22 (2) **the amount (if any) paid** for such property . . . shall be included in the
gross income of the person who performed such services . . .”

23
24 ¹ See *Montelepre Systemed, Inc. v. C.I.R.*, 956 F.2d 496, 498 at [1] (CA5 1992).

25 ² See 26 CFR 1.83-3(e), (f); *MacNaughton v. C.I.R.*, 888 F.2d 418 (CA6 1989); *Pledger v. C.I.R.*, 641 F.2d 287
(CA5 1981); *Alves v. C.I.R.*, 734 F.2d 478, 481 (CA9 1984); *Klingler Electric Co. v. C.I.R.*, 776 F.Supp. 1158,
1164 at [1] (S.D.Miss. 1991); *Robinson v. C.I.R.*, 82 USTC 444 (1984); *Cohn v. C.I.R.*, 73 USTC 443, 446 (1979).

26 ³ See *Butcher’s Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1883); *Slaughterhouse Case*, 83 U.S. 395,
419; 16 Wall. 36-130 (1873); *Adair v. U.S.*, 208 U.S. 161, 172 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915);
Black’s, 6th, “property.”

1 2.3 To figure one's cost ("amount paid"), one proceeds to 26 CFR 1.83-3(g) which says
2 that the term "amount paid" in § 83 refers to the value (the FMV/contract value) of any
3 property paid (labor) for the compensation.

4 26 CFR 1.83-3(g) Amount paid. For the purposes of section 83 and the regulations
5 thereunder, the term "amount paid" refers to *the value of any money or property paid*
6 for the transfer of property to which § 83 applies.

7 2.4 The sole grounds for adverse disposition of this claim has been that concerning prior
8 existing basis in the property disposed of to receive compensation to which § 83 applies. In
9 prior decisions, this claim was discounted under the reasoning that, because one has no basis in
10 their labor, because one's personal services were not purchased first before being sold to an
11 employer or customer/client by the employee or self employed individual, because of this the
12 labor or personal services could not be deemed a cost because it/they are property within which
13 the seller has no basis or *cost*. Labor has been excluded from cost solely because it is property
14 within which the laborer has no cost. (See **OP Ex.5**, Memorandum at pp. ___ of 58, *Talmadge*
15 decision excerpt, U.S.T.C. #339-95 (1996)).

16 2.5 As used in statute and regulation, the terms "any" or "any property" are to be
17 construed as all inclusive until express statutory exceptions can be cited to support a contention
18 that such terms are not all inclusive. (See *U.S. v. Monsanto*, 491 U.S. 600, 607-611 and
19 (syllabus) (1989); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994); *U.S. v.*
20 *Gonzales*, 520 U.S. 1, 4-6 (1997); *Department of Housing and Urban Renewal v. Rucker*, 535
21 U.S. 125, 130-31 (2002) citing *Gonzalez* and *Monsanto*).

22 **1989 - Monsanto** - Heroin manufacturer Monsanto argues that he should be allowed to
23 keep enough money for attorney's fees, but the DOJ argues successfully that "**any**
24 **property**" is all inclusive and therefore means the U.S. can seize any and all property
25 unless Monsanto can point to a specific exclusion of attorney's fees under the law. DOJ
26 can seize everything owned by defendant.

27 **1994 - Alvarez** - U.S. argues successfully that, **because statute expressly provides for**
28 **an exception to "any,"** that it is not all inclusive, that a "delay" should not preclude a
29 criminal defendant's confession or statement to state police from being used as evidence
30 in federal case commenced thereafter. DOJ can use confession sought to be suppressed
31 by criminal defendant.

1 **1997 - Gonzales - U.S. argues successfully** that “**any**” in sentencing laws is all inclusive
2 and therefore prevents the defendants from serving federal time concurrently with other
3 sentences, argues for more jail time and gets it. More jail time for convict.

4 **2002 - Rucker (citing Monsanto and Gonzales) - U.S. argues successfully** that “innocent
5 owner” defense unavailable to co-tenant of low income housing who, although
6 innocent, was subject to the statute’s eviction of an all inclusive “any tenant” of a leased
7 unit where prohibited activity had taken place. U.S. can evict the innocent tenant of low
8 income housing unit which is scene of prohibited behavior.

9 See *Talmage v. Comm’r of IRS*, #339-95, Stephen Talmage was penalized \$6500.00 for
10 offering to concede all facts in exchange for “how to comply with § 83”. U.S.T.C. Order and
11 Decision, 3/11/96, pg.8, 19, 20. **Begin here** with Tax Court’s assessment of the § 83 claim: -

12 “Because the issues are purely legal, this case is ripe for summary judgment. Tax
13 protester arguments like the claim that wages are not taxable income also suffice (as an
14 alternative to dismissal, and in the absence of better argument) to justify summary
15 judgment for the respondent. (protester cite omitted). Even if wages are, in effect, an
16 exchange of value for equal value, they are nevertheless taxable income. (protester cite
17 omitted) And even if we apply section 1001, his basis is determined under sections 1011
18 and 1012 as his cost, not fair market value. **Since he paid nothing for his labor, his cost
19 and thus his basis are zero.** (protester cite omitted) Consequently, even under section
20 1001, his taxable income from his labor is his total gain reduced by nothing, *i.e.*, his
21 wages.

22 “Petitioner’s primary argument is that section 83, Property Transferred in Connection
23 with the Performance of Services, has the effect of exempting his wages from income tax
24 because it requires us to apply section 1012, which specifies that cost should be used to
25 determine the basis of property (unless the Code provides otherwise) to determine the
26 extent to which wages constitute taxable income. Petitioner asserts that he “paid” for his
wages with his labor and that section 83 allows the value of his labor as a cost to be offset
against his wages, thereby exempting them from tax. Section 83 provides that property
received for services is taxable to the recipient of the property to the extent of its fair
market value minus the amount (if any) paid for the property. In attempting to equate his
wages with property for which he has a tax cost, petitioner’s argument is nothing more
than a variation of the wages-are-not-income claim frequently advanced by tax protesters,
and it is completely without merit. (protester cites omitted) Petitioner’s argument fails for
the same reason that other protester’s arguments fail; ***the worker’s cost for his services-
and thus his basis-is zero, not their fair market value.***”

*End quote from *Talmage*.

2.6 No, the petitioner asserted that “any money or property” includes his personal
services because no law allows for such to be excluded from that phrase or term. No, the

1 petitioner claims no *exemption*, but rather claims the “excluded by law” exclusion from gross
2 income found in 26 USC § 61(a), *ala*, “unless excluded by law.”

3
4 “We agree with the analysis in *Voorhies* -- a formal tax assessment that has
5 become administratively final is *prima facie* evidence of the asserted tax deficiency,
6 **and if unchallenged**, it may suffice to prove this element of the crime. **But the**
7 **assessment is only prima facie proof of a deficiency. The assessed deficiency may be**
8 **challenged by the defendant accused of tax evasion, and the issue is one for the jury.**
9 As the Supreme Court said in *United States v. Martin Linen Supply Co.*, 430 U.S. 564,
10 572-73 (1977), the jury’s -

11
12 overriding responsibility is to stand between the accused and a potentially
13 arbitrary or abusive government that is in command of the criminal sanction. ***For***
14 ***this reason, a trial judge is prohibited from entering a judgment of conviction or***
15 ***directing a jury to come forward with such a verdict, regardless of how***
16 ***overwhelmingly the evidence may point in that direction.***

17
18 (Citations omitted.) This conclusion is consistent with *United States v. England*, where
19 the government conceded that ***proof of a valid assessment was essential to its evasion***
20 ***case, and the court held it was error to instruct the jury the assessment was valid as a***
21 ***matter of law.*** 347 F.2d at 430. *England* was followed in *United States v. Goetz*, 746
22 F.2d 705, 708-10 (11th Cir. 1984). ***Our conclusion is also consistent with decisions***
23 ***that the taxpayer may defend a charge of willfully evading the assessment of taxes by***
24 ***proving there was no tax due and owing***, for example, ***by evidence of unclaimed***
25 ***deductions and expenses.*** See, e.g., *Clark v. United States*, 211 F.2d 100, 103 (8th Cir.
26 1954); see also *Sansone*, 380 U.S. at 354 (the crime of tax evasion is complete when a
false return is filed “***assuming, of course, that there was in fact a deficiency***”).

We find further support for this conclusion in the Supreme Court’s cases dealing
with the validity of presumptions in criminal cases. The government argues, in effect,
that the alleged tax deficiency may be conclusively presumed from an administratively
final assessment. ***But conclusive presumptions are invalid in criminal cases because***
they “conflict with the overriding presumption of innocence with which the law
endows the accused and which extends to every element of the crime, and would
invade the factfinding function which in a criminal case the law assigns solely to the
jury.” *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (quotations omitted). The
court’s approach in *Voorhies*, on the other hand, creates in effect only a permissive
presumption, one that “merely allows an inference to be drawn and is constitutional so
long as the inference would not be irrational.” *Yates v. Evatt*, 500 U.S. 391, 402 n.7
(1991). It is rational to infer that an assessment which the taxpayer chose not to contest
is *prima facie* evidence of the asserted deficiency. ***But it is not rational to make the***
assessment conclusive proof of the deficiency, particularly because in the absence of a
tax return an assessment is based upon a “substitute” return prepared by the IRS without
the benefit of factual input from the taxpayer.

1 **For the foregoing reasons, we conclude that one accused of tax evasion must**
2 **have the opportunity to prove, however unlikely the proposition may be, that an**
3 **administratively final tax assessment does not accurately reflect the existence of a tax**
4 **deficiency.** Therefore, *Silkman* is entitled to a new trial at which he may introduce
5 **evidence relevant to whether there was in fact a tax deficiency in one or more of the**
6 **tax years in question.**"

7 See *U.S. v. Elton Silkman*, 156 F.3d 833 (CA8 1998).

8 2.7 Defendant has proven that no tax is owing on his pension payments for the fact that
9 they are paid directly in recognition of services actually performed, and are so paid as a matter
10 of original employment contract terms, placing them squarely within the arm's length
11 transaction *fair market value* identified in 26 CFR 1.83-3(g) as an "amount paid," *a fortiori*,
12 separating such receipts from gross income as a matter of law, leaving no § 61(a) gross income
13 to report, and no § 63 taxable income to tax. For as long as the due exclusion of the value of
14 Defendant's personal services from "any money or property" remains without disclosure, for as
15 long as such exclusion remains clearly an arbitrary standard, all further proceedings on Counts
16 challenged herewith constitute a violation of due process for the fact that four S.Ct. decisions
17 won by the Plaintiff are set aside in bold defiance of the standard of interpretation established
18 thereby, to imprison an old man. Consider that "[s]ection 83(a) explains how property received
19 in exchange for services is taxed."⁴

20 "Petitioners rest their entire case on the proposition that Elovich and Cohn and/or Mega
21 were "independent contractors" and not employees of the Integrated and that, therefore,
22 section 83 does not apply to the acquisition of the shares from Integrated. They rely on
23 the legislative history surrounding the statute to support their proposition that section 83
24 was intended to apply only to restricted stock transferred to employees. ***Respondent***
25 ***contends that the words "any person" in section 83(a) encompass independent***
26 ***contractors as well as employees.*** We agree with Respondent. . . . We reject petitioner's
 argument. While restricted stock plans involving employers and employees may have
 been the primary impetus behind the enactment of section 83, ***the language of the***
 section covers the transfer of any property transferred in connection with the
 performance of services "to any person other than the person for whom the services are
 performed." (Emphasis added.) The legislative history makes clear that Congress was
 aware that the statute's ***coverage extended beyond restricted stock plans for employees.***
 H.Rept. 91-413 (Part 1) (1969), 1969-3 C.B. 200, 255; S.Rept. 91-552 (1969), 1969-3
 C.B. 423, 501. The regulations state that that section 83 applies to employees and
 independent contractors (sec. 1.83-1(a), Income Tax Regs.). There is no question but

⁴ See *Montelepre Systemed, Inc. v. C.I.R.*, 956 F.2d 496, 498 at [1] (CA5 1992).

1 that, under the foregoing circumstances, *these regulations are not “unreasonably and*
2 *plainly inconsistent with the revenue statutes.” Consequently, they are sustained.*
3 (cites omitted)”

4 See *Cohn v. C.I.R.*, 73 USTC 443, 446 (1979).

5 2.8 IRS accountant and agent, Sue Besson, has worked for the IRS for 21 years and
6 claims to have conducted approximately 500 examinations of individual ‘taxpayers’ over that
7 time as a person responsible for “determining” tax liabilities under tax law and deciding which
8 ones to recommend for prosecution and which ones to merely forward to an IRS officer for
9 collection; that’s the difference between and agent and an officer. On **August 9, 2007**, in U.S.
10 District Court, Seattle Division, Ms. Besson was asked by counsel Allen Ritchie, “What role
11 did § 83 play in your determination that the defendant had a tax liability on his compensation?”
12 To which Ms. Besson replied, “I am unfamiliar with § 83.” (See *United States v. Ray Gebauer*,
13 #CR06-122JLR, see transcript of **8/9/07** at 9:55 a.m. in § 7201 tax evasion trial). From a private
14 individual’s perspective this standard of due process is a spectacle of tyranny.

15 III. CONCLUSION & RELIEF.

16 3.1 *Arguendo*, under the Sixth Amdt. a court may lose jurisdiction early in the
17 proceedings for its failure to complete itself in relation to appointment of counsel to a criminal
18 defendant, such a deficiency constituting “a jurisdictional bar” to further proceedings.⁵

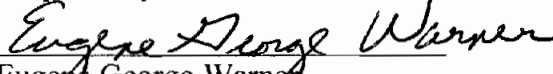
19 ⁵ See *Johnson v. Zerbst*, 304 US 458, 467-68 (1938), “Since the Sixth Amendment constitutionally entitles one
20 charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential
21 jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty. When this right
22 is properly waived, the assistance of counsel is no longer a necessary element of the court’s jurisdiction to proceed
23 to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and
24 intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid
25 conviction and sentence depriving him of his life or his liberty. ***A court’s jurisdiction at the beginning of***
26 ***trial may be lost “in the course of the proceedings” due to failure to complete the court -- as the Sixth***
Amendment requires -- by providing counsel for an accused who is unable to obtain counsel, who has
not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this
requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to
proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one
imprisoned thereunder may obtain release by habeas corpus. A judge of the United States -- to whom
a petition for habeas corpus is addressed -- should be alert to examine “the facts for himself when if
true as alleged they make the trial absolutely void.” The standard for rights to counsel under the Sixth
Amendment set forth in *Johnson v. Zerbst, Id.*, are the benchmark for determining claims of deprivations of such
right. See *Alabama v. Shelton*, 535 US 654 (#00-1214) (2002); *Stewart v. Lagrand*, 526 US 115, 119 (1999);
College Savings Bank v. Florida Prepaid Educ. Exp. Bd., 527 US 666, 682 (1999); *U.S. v. Mezzanatto*, 513 US

1 3.2 Defendant hereby charges that Plaintiff's ongoing failure to prove that its having
2 excluded the value of Defendant's personal services from "the value of any money or property
3 paid" was not an arbitrary exclusion constitutes a failure to complete the Court, *a fortiori*, it
4 constitutes a jurisdictional bar to further proceedings under the Fifth Amdt. as it relates to
5 counts challenged herein, and proves that the Plaintiff cannot satisfy a jury as to the existence
6 of a tax liability, an element essential to a finding of guilt.

7 3.3 Defendant has received no gross income as alleged, he has evaded no tax, and he's
8 falsified no government forms of any nature. Plaintiff burden is framed in the questions for
9 review at conclusion of § 83 (and 26 USC §§ 212, 1001, 1011, and 1012) argument in
10 Defendant's memorandum. (See **OP** Ex.5, at ¶¶4.26 to 4.48, of 58 pg. Memorandum). Until
11 such time as when Plaintiff proves that these laws have operated in the allegations that
12 Defendant had such purported duties, due process requires dismissal of the counts challenged
13 herein.

14 Dated: 11-25-2008

Respectfully submitted:


Eugene George Warner
3731 Laron Lane
Anchorage Alaska 99504

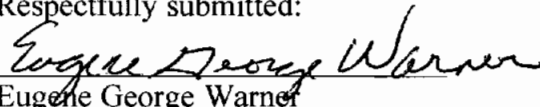
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23 196, 201 (1995); *Custis v. U.S.*, 511 US 485, 490, 494-95 (1994); *Custis v. U.S.*, 511 US 485, at 494-95 (1994);
24 *Davis v. United States*, 512 US 452, 469-70 (1994); *U.S. v. Olano*, 507 US 725, 733 (1993); *Godinez v. Moran*,
25 509 US 389, 396, 401 (1993); *Patterson v. Illinois*, 487 US 285, 292 (1988); *Connecticut v. Barrett*, 479 US 523,
26 531 (1987); *Murray v. Carrier*, 477 US 478 (1986); *Kimmelman v. Morrison*, 477 US 365 (1986); *Michigan v.*
Jackson, 475 US 625, 633 (1986); *Moran v. Burbine*, 475 US 412, 421 (1986); *Maine v. Moulton*, 474 US 159,
169 (1985); *Evitts v. Lucey*, 469 US 387, 394 (1985); *US v. Gouveia*, 467 US 180, 188-89 (1984); *Strickland v.*
Washington, 466 US 668, 684-85 (1984); *Solem v. Stumes*, 465 US 638, 647 (1984); *Rushen v. Spain*, 464 US 114,
128, and fn.7 (1983); *Edwards v. Arizona*, 451 US 477-78 (1981); *US v. Morrison*, 449 US 361, 364 (1981);
Cuyler v. Sullivan, 446 US 335, 343 (1980).

1 3.2 Defendant hereby charges that Plaintiff's ongoing failure to prove that its having
2 excluded the value of Defendant's personal services from "the value of any money or property
3 paid" was not an arbitrary exclusion constitutes a failure to complete the Court, *a fortiori*, it
4 constitutes a jurisdictional bar to further proceedings under the Fifth Amdt. as it relates to
5 counts challenged herein, and proves that the Plaintiff cannot satisfy a jury as to the existence
6 of a tax liability, an element essential to a finding of guilt.

7 3.3 Defendant has received no gross income as alleged, he has evaded no tax, and he's
8 falsified no government forms of any nature. Plaintiff burden is framed in the questions for
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Cuyler v. Sullivan, 446 US 335, 343 (1980).

- CERTIFICATE OF SERVICE -

I, Christopher-Rhodes Chapman, do hereby certify that I am over 18 years of age; I did and one of the following:

Deposit in U.S. Post First Class and in adequate packaging

or

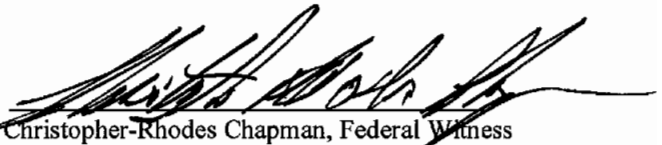
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the attached document(s), (Eugene George Warner's "DEFENDANT'S MOTION TO DISMISS Counts 1,3,4,5 and 6 of indictment 26 USC §83)to the following partie(s):

Hugh W. Fleischer
310 K. Street, Suite 200
Anchorage, Alaska 99501

Thomas Bradley LEAD U.S. ATTORNEY
Federal Bldg./US Courthouse,
222 W. 7th Ave. #9, Rm.253,
Anchorage, AK 99513-7567.

Date: November 20, 2008

By: 
Christopher-Rhodes Chapman, Federal Witness