APPEAL NO.: 08-13740-C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

GERARD MARCHELLETTA, JR.,

Defendant-Appellant.

ON APPEAL FROM CRIMINAL JUDGMENT
IN THE U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
THE HONORABLE TIMOTHY C. BATTEN, SR., JUDGE PRESIDING
DISTRICT COURT CASE NO. 1:07-cr-00107-TCB-AJB

GERARD MARCHELLETTA, JR.'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons or entities, believed to be within the classes of persons set out in Cir. R. 26.1-1, have an interest in the outcome of this case.

1. Justin Anand, Asst. U.S. Attorney, Attorney for the Plaintiff-Appellee;

2. Timothy C. Batten, Sr., U.S. District Judge;

3. Robert G. Bernhoft, Esq., Attorney for Defendant-Appellant Gerard C. Marchelletta, Jr.;

4. Circle Industries, Inc., a closely-held corporation owned by Defendants-Appellants Gerard C. Marchelletta, Jr. and Gerard C. Marchelletta, Sr.;

5. Jerome J. Froelich, Esq., Attorney for Defendant-Appellant Theresa L. Kottwitz;

6. Jim Jenkins, Esq., Attorney for Defendant-Appellant Gerard C. Marchelletta, Sr.;

7. Theresa L. Kottwitz; Defendant-Appellant;

8. Agne Krutules, Esq., Attorney for Defendant-Appellant Gerard C. Marchelletta, Sr.;

9. Bruce Maloy, Esq., Trial Attorney for Defendant Gerard C. Marchelletta, Jr.;

10. Gerard C. Marchelletta, Jr., Defendant-Appellant;

11. Gerard C. Marchelletta, Sr., Defendant-Appellant;

12. David E. Nahmias, U.S. Attorney, Attorney for Plaintiff-Appellee;

13. Wilmer Parker, III, Esq., Attorney for Defendant-Appellant Gerard C. Marchelletta, Sr.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Gerard Marchelletta, Jr. respectfully requests oral argument. Profound insecurity about the government's basic theory of criminality motivated the prosecutor to resort to highly improper argument in opening statement, repeatedly invoking the pecuniary interest of the jurors as victimized taxpayers and engaging in the worst sort of appeals to economic envy and class bias. With the trial irreparably tainted by the prosecutor's unprofessional conduct in opening statement, an inexperienced but well-intentioned district court unfortunately added to the trial's unfairness by declining to charge the jury on the core theory of defense – good faith reliance on accounting advice – an unfortunate but serious mistake that removed any vestige of a fair trial.

Oral argument is also necessary to resolve the important issues raised by the Supreme Court's unanimous decision in *Boulware v. United States*, 128 S.Ct. 1168 (2008). The prosecution's case rested entirely on the classification, timing, and proper reporting of distributions to shareholders of a closely held corporation, and no other Court of Appeal has been called upon to consider *Boulware's* application to a criminal tax case in this context. Marchelletta, Jr. respectfully submits that oral argument is essential to aid the Court's understanding and resolution of these important issues.

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STATEMENT REGARDING
ADOPTION OF BRIEFS OF OTHER PARTIES

Gerard Marchelletta, Jr. hereby adopts by reference the portion of the Gerard Marchelletta, Sr.'s Opening Brief entitled "Part II – The Evidence Was Insufficient to Sustain Defendant's Convictions on Counts One, Four, Five, and Six." The section begins on page 27 of Gerard Marchelletta, Sr.'s Opening Brief and ends on page 49. Gerard Marchelletta, Jr. was convicted of Counts One and Six with Gerard Marchelletta, Sr., and both Gerard Marchelletta, Jr. and Gerard Marchelletta, Sr. were convicted of filing a false and fraudulent tax return for 2000 in Counts Three and Four respectively.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231 in that the case involved an offense against the laws of the United States. The Eleventh Circuit Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Prosecutor's highly improper opening statement argument that invoked the jurors' pecuniary interests as victimized taxpayers and impermissibly appealed to class and economic envy deprived the defendants of a fair trial.

2. Whether the refusal to give a theory-of-defense reliance on accountant jury instruction, where the trial record was replete with evidence of full disclosure and good faith, contravened longstanding Circuit precedent and deprived the defendants of a fair trial.

3. Whether the evidence was sufficient to convict Gerard Marchelletta, Jr. of any of three tax count convictions when, as a matter of law, the transactions alleged to be the basis of a tax deficiency could not have been characterized for tax purposes until the end of the corporation's fiscal year.

STATEMENT OF THE CASE

Nature of the Case

This is a criminal tax case. The three defendants, Gerard Marchelletta, Jr, , "Marchelletta, Jr."), Gerard Marchelletta, Sr. ("Marchelletta, Sr."), and Theresa L. Kottwitz ("Kottwitz") all worked together in a business called Circle Industries, Inc. ("Circle"). Marchelletta, Jr. was Circle's President and a 23.5% owner, Marchelletta, Sr. was a 76.5% owner, and Kottwitz was Circle's bookkeeper.

(Vol. 18, Doc. 206, p. 153:12-13; Vol. 20, Doc. 207, p. 500:12-21; Vol. 22, Doc. 99, p. 33:15-23.)

The prosecution's case hinged on the classification of distributions Circle made on behalf of its two shareholders, and whether those distributions were classified correctly and timely reported on the Marchellettas' personal returns for 2000 and Circle's corporate return for the fiscal year ending March 31, 2001. (Vol. 1, Doc. 42.)

In early 1999, Marchelletta, Jr. obtained a $250,000 loan from a company owned by one of Marchelletta, Jr.'s close business associates. (Vol. 18, Doc. 206, p. 262:6-7.) The $250,000 was used as a downpayment to purchase a vacant lot on which Marchelletta, Jr. planned to construct a home. *Id*., p. 186:2-4. The government asserted that the loan was a sham and that Marchelletta, Jr. should have reported the $250,000 as income along with the aggregate total of several other personal expenses related to clothing purchases and entertainment expenses on Marchelletta, Jr.'s 1999 personal tax return. (Vol. 1, Doc. 42.) The jury rejected those contentions and acquitted Marchelletta, Jr. of filing a materially false return for 1999. (Vol. 2, Doc. 109.)

In 2000, both Marchelletta, Jr. and Marchelletta, Sr. (collectively, the "Marchellettas") began constructing homes on their respective vacant lots. (Vol. 18, Doc. 206, p. 186:2-4; Vol. 20, Doc. 207, p. 381:11-14.) Circle paid the

vendors directly and accounted for these distributions by setting up unique job-costing account numbers in its accounting records. *See* footnote 1, *infra*. Circle's CPA, Gary Schwartz, ("CPA Schwartz") audited the books after Circle's fiscal year ended on March 31, 2001, but did not adjust the entries related to the home construction projects and the distributions were reported as cost-of-goods-sold on Circle's fiscal year 2001 tax return. (Vol. 22, Doc. 99, pp. 42:12-15, 65:5-11.) CPA Schwartz also prepared the Marchellettas' personal tax returns, but did not include the distributions as personal income on their respective 2000 personal tax returns. *Id*., pp. 36:19-37:1.

A significant issue in this appeal is not only *how* those distributions should have been classified – as a loan, dividend, salary or bonus – but also *when* the classifications could have been made as an objective tax law matter, and on what return they should have been reported.

At trial, the prosecutor made highly improper opening statement argument which irreparably tainted the jury trial and affected the Marchellettas' and Kottwitz's substantial rights. (Vol. 17, Doc. 205, pp. 11:14-16, 28:1-3.) The Marchellettas also requested a "reliance on accountant" jury instruction which was improperly denied. (Vol. 28, Doc. 212, pp. 1199:24-1200:2.) Finally, the Supreme Court's unanimous decision in *Boulware v. United States*, 128 S.Ct. 1168 (2008) confirmed that the Marchellettas' joint post-trial Rule 29 Motion for

Judgment of Acquittal should have been granted because distributions made to a shareholder of a closely-held corporation cannot be classified for tax purposes until the final date of the corporation's fiscal year. (Vol. 2, Docs. 106, 127, and 134.)

Course of Proceedings:

On April 2, 2007, an indictment issued against Marchelletta, Jr., Marchelletta, Sr., and Kottwitz. (Vol. 1, Doc. 1.) Three months later, on July 2, 2007, a superceding indictment was filed against the same three defendants. (Vol. 1, Doc. 42.) The superceding indictment charged Marchelletta, Jr. with four felony counts: (1) Count One charged a violation of 18 U.S.C. § 371, a *Klein* Conspiracy, *id*., pp. 1-11; (2) Count Two charged a violation of 26 U.S.C. § 7206(1), making a materially false personal income tax return for 1999, *id*., pp. 11-12; (3) Count Three charged a violation of 26 U.S.C. § 7206(1), making a materially false personal income tax return for 2000, *id*., pp. 12-13; and (4) 26 U.S.C. § 7206(2), aiding and assisting the filing of a materially false corporate income tax return for a fiscal year ending March 31, 2001, *id*., p. 16. Marchelletta, Sr. and Kottwitz were charged along with Marchelletta , Jr. with conspiracy under Count One and with aiding and assisting the filing of a materially false corporate tax return under Count Six. *Id*., pp. 1-11 and 16. Separately, Marchelletta, Sr. was also charged in Count Four with filing a materially false personal income tax return for 2000 and in Count Five for tax evasion for 2000. *Id*., pp. 13-15. Kottwitz was charged

separately with aiding and assisting the filing of materially false tax returns for Junior related to 1999 and 2000 and for Senior for 2000 in Counts Seven, Eight, and Nine. *Id*., pp. 17-19.

A jury trial commenced on September 17, 2007 as to all defendants. (Vol. 1, Doc. 82.) During the opening statement, the prosecutor argued: "[The defendants] conspired to file even more massively false returns in 2001, that all of those things [the emblems of Marchelletta's lavish lifestyle previously recounted to them] were crimes, crimes against the United States and its taxpayers." (Vol. 17, Doc. 205, p. 11:14-16.) The prosecutor also made the following argument during his opening statement conclusion: "And it is the United States here that is the victim of this case, the United States and its taxpayers." *Id*., p. 28:1-3.

After the close of all evidence, the government dismissed Count Seven against Kottwitz on September 27, 2007. (Vol. 2, Doc. 94.) At the jury instruction conference, the Marchellettas and Kottwitz argued for a "reliance on accountant" instruction, (Vol. 28, Doc. 212, pp. 1200:23-1201:8.), and the district denied the request over defense objection. *Id*., pp. 1199:24-1200:2. During the government's rebuttal phase of closing argument, the prosecutor told the jury: "[T]heir defense is that Schwartz was supposed to know about all this . . . ." (Vol. 29, Doc. 213, p. 1329:21-23.)

The Jury began deliberating on October 1, 2007 and a verdict was reached on October 3, 2007. (Vol. 2, Docs. 102, 103, and 107.) The jury found Marchelletta, Jr. not guilty of Count Two and Kottwitz not guilty of Counts Eight and Nine. (Vol. 2, Doc. 109.) Marchelletta, Jr. was convicted of Counts One, Three, and Six; Marchelletta, Sr. was convicted of Counts One, Four, Five, and Six; and Kottwitz was convicted of Counts One and Six. *Id*.

The Defendents were sentenced on June 20, 2008. (Vol. 3, Doc. 152.) At the hearing, Marchelletta, Jr. was sentenced to thirty-six months imprisonment on each of Counts One, Three, and Six to be served concurrently, followed by a term of Supervised Release totaling thirty-six months on Count One and twelve months on each of Counts Three and Six all to be served concurrently. (Vol. 3, Docs. 154; Vol. 30, Doc. 204.) The Judgment of conviction and sentence was entered on June 30, 2008. (Vol. 3, Doc. 154.) Marchelletta, Jr. filed a timely Notice of Appeal on July 2, 2008. (Vol. 3, Doc. 162.)

The Marchellettas filed a joint motion for bond pending appeal on July 14, 2008. (Vol. 3, Doc. 183.) The court found "that the appeal would raise 'a substantial question of law or fact' and a decision in Defendant's favor could result in reversal or an order for a new trial on all counts on which imprisonment has been imposed" and granted the motion. (Vol. 3, Do. 186, p. 3.) Marchelletta, Jr. is currently released on his personal recognizance. (Vol. 4, Doc. 191.)

Statement of the Facts:

1. *Circle Industries*

Circle Industries, Inc. (hereinafter "Circle") is a drywall contractor specializing in large commercial jobs, such as hotels and stadiums. (Vol. 17, Doc. 205, p. 95:15.) Marchelletta, Jr. is the President of Circle and owns a 23.5% interest in the company. (Vol. 18, Doc. 206, p. 153:12-13.) Marchelletta, Jr.'s father, Marchelletta, Sr., owns Circle's remaining stock. (Vol. 20, Doc. 207, p. 500:12-21). After working in New York for many years, Marchelletta, Jr. relocated to Atlanta, Georgia in the early 1990's to begin Circle. *Id*., pp. 370:21-371:1.) The business was successful, and by 1999, the first time period relevant to this case, Circle had expanded its operation to the Bahamas. (Vol. 18, Doc. 206, p. 228:3-5.)

In 1998, Circle was awarded a construction project working on the Atlantis hotel and casino in Nassau, Bahamas. *Id*., p. 225:16-20. Bahamian employment law required that work crews employed in the Bahamas work solely for Bahamian companies. (Vol. 20, Doc. 207, p. 415:23-25.) Circle organized Circle Industries, Ltd, a Bahamian company, to pay its employees. (Vol. 18, Doc. 206, p. 239:1-11.)

2. *Marchelletta, Jr. and Marchelletta, Sr. Build Their Homes*

During this same time period, Marchelletta, Jr. purchased a vacant residential lot upon which to build his home. He purchased the lot on March 3,

1999, *id*., p. 186:2-4, and paid $250,000 towards the downpayment on the residential lot at the mid-April closing. *Id*., p. 262:6-7. This downpayment was received from C&G Enterprises, Ltd., another Bahamian company owned by one of Marchelletta, Jr.'s business associates. *Id*., p. 227:19-20; Vol. 21, Doc. 208, pp. 852:19-22, 853:11-13, 853:22-23.) Home construction commenced in January of 2000 after the requisite downpayment was made. (Vol. 18, Doc. 206, pp. 277:1-2, 278:15-16.) In April of 2000 – the first month of Circle's fiscal year 2001 – Circle began paying several contractors for Marchelletta, Jr.'s home construction project. (Gov.'s Exhibits, 12.28 and 12.29; Vol. 18, Doc. 206, pp. 281:13-20, 278:19-21.)[1]

[1] Circle paid many vendors during the 2001 corporate fiscal year ending March 31, 2001: the cabinet maker, Jay Moore, (Vol. 20, Doc. 207, p. 603:19-21; Gov.'s Exhibits 412-412.7); a drywall installation company, Gilmore Drywall Co., (Vol. 21, Doc. 208, p. 632:5-15; Gov.'s Exhibit 12.76); custom garage doors, Shamrock Doors, (Vol. 21, Doc. 208, p. 645:3-646:13; Gov.'s Exhibit 242); landscaping company, Christian Crawford, (Vol. 21, Doc. 208, p. 666:18-667:1; Gov.'s Exhibit 232); marble fabrication and installation, Marble Creations, (Vol. 21, Doc. 208, p. 706:11-17; Gov.'s Exhibits 408-408.16); fireplace installer, Stone Age Designs, (Vol. 23, Doc. 209, p. 915:2-6; Gov.'s Exhibits 228 and 250). Circle also paid several vendors after the 2001 corporate fiscal year ended: landscaping company, Allgreen Landscape, (Vol. 21, Doc. 208, p. 652:22-653:7; Gov.'s Exhibit 294); water fountain installer, Specialty Fountain & Waterscape, Inc., (Vol. 21, Doc. 208, p. 659:10; Gov.'s Exhibits 117.3 and 246); heating and air conditioning contractor, Bartlett Heating & Cooling, (Vol. 21, Doc. 208, p. 675:7-20; Gov.'s Exhibits 297 and 315); drywall company, Jim Rast Drywall, (Vol. 21, Doc. 208, p. 690:4-12; Gov.'s Exhibits 12.269 and 12.274); cabinet manufacturer, Modern Industries, (Vol. 21, Doc. 208, p. 726:3-7); fence installer, American Landmark, *id*., p. 762:8-12; Gov.'s Exhibit 304; floor tile installer, Louis Buckman, (Vol. 25, Doc. 210, p. 1009:6-13; Gov's Exhibit 245).

Marchelletta, Jr. believed his CPA was classifying these distributions as a loan from Circle to Marchelletta, Jr. (Vol. 18, Doc. 206, p. 306:1-6.)

Marchelletta, Jr. managed Circle's job-costing by naming each project and assigning an appropriate number. (Vol. 20, Doc. 207, p. 376:22-377:13.) The standard job number would consist of five digits. The first two digits corresponded to the year the project began and the last three digits were assigned consecutively in chronological job order. *Id*., pp. 376:22-377:13. Marchelletta, Jr.'s home construction project was assigned the name "Newport Bay" (corresponding to the home's subdivision) and the number 00998. (Gov.'s Exhibit 431.1, p. 4; Vol. 20, Doc. 207, pp. 380:24-381:10.) Marchelletta, Sr.'s home construction project was assigned the name "Crabapple" (corresponding to the home's subdivision) and the number 00999. (Gov.'s Exhibit 431.1, p. 4; Vol. 20, Doc. 207, p. 381:11-14.) Both job numbers were unique and did not follow the typical job order's numbering system.

3. *CPA Gary Schwartz*

Certified public accountant Gary Schwartz ("CPA Schwartz") and Circle's bookkeeper Kottwitz managed Circle's books and financial records. (Vol. 22, Doc. 99, p. 33:15-23.) CPA Schwartz first worked for a Marchelletta business when he did CPA work for Natasi, Inc., a New York City construction company – a corporation Marchelletta, Sr. partially owned. *Id*., pp. 29:11-14, 30:15-19. CPA

Schwartz spent ten percent of his time on Nastasi-related work prior to opening his own business. *Id*., p. 38:4-6. CPA Schwartz had audited Circle every year since fiscal year 1999. *Id*., p. 45:1-13. After CPA Schwartz opened his own office in 2001, CPA Schwartz took on Circle as his client and continued to serve the Marchellettas personally by preparing their individual tax returns. *Id*., pp. 36:19-37:1. CPA Schwartz traveled personally to Atlanta once per year to audit Circle's books. *Id*., p. 42:12-15. CPA Schwartz coordinated those trips with a time shortly after the end of the fiscal year such that appropriate adjusting entries could be made on Circle's books to close out the fiscal year, which ended on March 31st of each year. *Id*., pp. 41:21-25, 42:7-9, 43:12-15.

CPA Schwartz would review the books and records with Kottwitz, Circle's bookkeeper. *Id*., p. 43:1-5. CPA Schwartz had as much time as he needed to complete his audit work and had complete access to Circle's books and records. *Id*., pp. 47:18-21, 162:1-7. Each tax year, Marchelletta, Jr. signed a document in which he "confirm[ed] to the best of [his] knowledge and belief" that he had given CPA Schwartz all relevant documentation necessary for CPA Schwartz to audit Circle's books and prepare the corporate and personal tax returns. *Id*., p. 51:9-15; Gov.'s Exhibit 427.10.

After each fiscal year, CPA Schwartz specifically reviewed the job management list that included both Marchelletta, Jr.'s and Marchelletta, Sr.'s home

construction jobs. *Id*., pp. 65:5-11. For the fiscal year ending March 31, 2001, the home construction jobs listed no income as received, but listed substantial costs. (Vol. 22, Doc. 99, p. 51:9-11; Voc. 20, Doc. 207, pp. 431:24-432:19.) CPA Schwartz admitted at trial that he should have made inquiries about the home construction jobs because the absence of income was unusual and testified that they should have stuck out as a red flag. (Vol. 22, Doc. 99, pp. 65:5-11). Marchelletta, Jr. relied on Schwartz to prepare accurate tax returns and financial statements,[2] and Schwartz knew that: "Q. And you're the professional, you're the CPA. They're relying on that. That's your audit function, isn't it, sir? A. Yes." *Id*., p 185:3-5.

Schwartz testified that he made unilateral decisions about classification without seeking Marchelletta, Jr.'s approval; in particular, CPA Schwartz reclassified certain transactions related to Marchelletta, Sr.'s and Circle's consulting agreement with Nastasi, Inc. *Id*., pp. 120:24-121:4, 122:17-23. CPA Schwartz also had full responsibility and authority to classify any payments or

[2] The citations setting forth Junior's reliance on CPA Schwartz were threaded throughout CPA Schwartz's testimony: (Vol. 22, Doc. 99, pp. 32:6-7; 32:16-19; 35:2-6; 37:14-16; 39:3-5; 46:20-47:1; 47:18-21; 56:15-18; 60:13-14; 65:9-11; 91:7; 98:10-15; 103:3-22; 120:19-121:4; 122:18-23; 123:7-10; 125:4-7; 125:10-14; 140:2-10; 144:23-145:20; 146:2-5; 161:24-25; 162:2-23; 163:22-164:24; 173:25-175:3; 175:19-21; 177:3; 178:12-18; 179:8-10; 181:22-182:17; 183:7-9; 184:1-15; 185:3-5; 186:6-9; 187:3-13). Other citations include: (Vol. 20, Doc. 207, pp. 424:21-425:7; 431:5-12; 515:21-24; 581:12-14; 582:7-15; 583:4-14). Senior relied on a tax attorney: *Id*., p. 524:18-23.

expenses made on behalf of any of the owners of Circle. *Id*., p. 60: 13-14 ("Q. Did anyone ever try and limit your analysis in any way? A. No.").

CPA Schwartz testified at trial regarding the shareholder distributions for the Marchellettas' home construction projects that there are two ways that the transactions could have been classified: the distributions on behalf of the owners could have constituted compensation, or could have been set up as a loan, and ultimately could have been loan forgiveness income – income to the Marchellettas when the loan was forgiven. (Vol. 22, Doc. 99, pp. 70:9-71:3; Vol. 26, Doc. 101, p. 279:3-17.) IRS Revenue Agent Jack Lesso ("RA Lesso") also testified at trial regarding shareholder distributions from closely-held corporations. (Vol. 26, Doc. 101, pp. 278:14-280:3.) Upon cross-examination, RA Lesso testified that this classification could not have been done until the end of Circle's fiscal year, after March 31, 2001. *Id*., pp. 279:3-8, 280:1-3.) RA Lesso testified: "[N]othing's final until the financial statements are prepared." *Id*., p. 278:19-20. Marchelletta, Jr.'s 2000 tax year closed prior to the end of Circle's 2001 fiscal year which is March 31, 2001.

4. *Other Distributions On Behalf of Shareholders*

Twenty of the forty-one government witnesses' testimony related to Marchelletta, Jr.'s expensive taste. In addition to the witnesses mentioned in footnote 1, *supra*, those witnesses included a tailor of custom-made suits, (Vol. 20,

Doc. 207, p. 592:10-18), and a witness describing expensive dinners and entertainment establishments Marchelletta, Jr. used to entertain business clients and associates. (Vol. 21, Doc. 208, p. 785:7-12). The general contractor described in minute detail Marchelletta, Jr.'s home, and the transcript covered forty-eight pages. (Vol. 18, Doc. 206, pp. 267-315.)

Standard of Review:

A. ***Prejudicial Error By the Prosecutor***: With no objection at trial, the issue of prosecutorial misconduct is subject to the plain error standard of review. *See* Fed. R. Crim. P. 52(b). "Under plain-error review, the defendant has the burden to show that 'there is (1) error (2) that is plain and (3) that affects[s] substantial rights.'" *United States v. Lejarde-Rada*, 319 F.3d 1288, 1290 (11th Cir. 2003) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). A defendant's substantial rights are affected if the error affected the outcome of the proceedings; that is to say, but for the error there is a reasonable probability of a different result, a probability sufficient to undermine confidence in the trial's outcome. *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005). In turn, "[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id*. (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)).

B. ***Reliance on Accountant Instruction***: This Court reviews a district court's refusal to charge on a requested jury instruction for an abuse of discretion. *United States v. Sirang*, 70 F.3d 588, 593 (11th Cir. 1995). A district court abuses its discretion if: (1) the instruction is correct; (2) the court did not address the substance of the instruction in its charge; and (3) it seriously impaired the defendant's ability to present an effective defense. *Sirang*, 70 F.3d at 593. This Court reviews *de novo* the issue of whether sufficient trial evidence supported the requested instruction. *United States v. Calderon*, 127 F.3d 1314, 1329 (11th Cir. 1997).

C. ***Boulware's Objective Determination of Tax Deficiency***: Where a motion for acquittal based on Fed. R. Crim. P. 29 is denied, this Court applies a *de novo* standard of review, *see United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002), and "views the facts and draws all inferences in the light most favorable to the government." *Id.* at 703.

SUMMARY OF THE ARGUMENT

Jerry Marchelletta, Jr.'s trial began with the prosecutor invoking the jurors' pecuniary interests as victimized taxpayers, in an unprofessional, highly improper, and deliberate harangue that showed utter contempt for basic principles of fairness, right, and law. Buttressing this blatant contravention of controlling Circuit precedent with shameless and repeated appeals to class and economic envy, the prosecutor deprived Marchelletta, Jr. of any vestige of a fair trial at the very outset of the case. The impermissible message was clear and unmistakable: the Marchellettas were living large on the backs of the hardworking, taxpaying jurors. Any juror admitting during *voir dire* that they felt victimized by Marchelletta, Jr.'s alleged tax crimes would have been struck for cause, because our law does not trust victims to render fair verdicts. The prosecutor's outrageous misconduct during opening statement irreparably infected the jury in this close case, and cast the entire judicial proceeding into unsalvageable disrepute.

Then, compounding the prosecutor's highly improper appeal to jury passion and prejudice, an inexperienced but well-intentioned district court refused to instruct the jury on the core theory of defense – reliance on accounting advice. Applying the wrong standard to when the reliance instruction must be given, the trial court confused what the jury must determine in order for the defendant "to succeed," with the "any-evidence-in-the-record" standard that determines when the

reliance instruction must be given – the standard employed by this Circuit for over forty years. On this record, replete with sometimes competing evidence of good faith reliance, it was for the jury to decide, not the court, whether the defendants made full disclosure to Circle's bookkeeper and outside CPA, and relied upon their tax and accounting advice in good faith. The refusal to give the reliance instruction stripped the defendants of their core theory of defense and further foreclosed a fair trial.

Finally, the prosecution's case revolved solely around the timing of objective tax classifications and reporting requirements for distributions to shareholders of a closely held corporation. The Supreme Court's recent unanimous decision in *Boulware* foreclosed any doubt that the district court should have granted, as a matter of law, the Marchellettas' joint motion for judgment of acquittal under Fed. R. Crim. P. 29, made even prior to the Supreme Court's unequivocal teaching. *See Boulware v. United States*, 126 S.Ct. 1168 (2008). There, the High Court held that intent is irrelevant regarding such distribution classifications, and that objective application of IRC Sections 301 and 316 controls. Under those Code sections, with the benefit of *Boulware's* objective application rule, Marchelletta, Jr. could not have made, as a matter of law, any material misstatement on the returns at issue. Consequently, the prosecution's evidence, even when viewed in a light most favorable to the government, was

insufficient for a reasonable juror to determine guilt or innocence on the tax and conspiracy conviction counts.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE PROSECUTOR'S OUTRAGEOUS OPENING STATEMENT MISCONDUCT IMPERMISSIBLY INVITED THE JURORS TO CONVICT MR. MARCHELLETTA, JR. BECAUSE THEY WERE VICTIMS OF HIS ALLEGED TAX CRIMES.

The prosecutor's highly improper opening statement argument is fairly paraphrased as follows: "Mr. Marchelletta knew the tax rules and didn't want to follow them like you and I have to, so he could live this lavish lifestyle that you and I can't . . . he committed crimes against you and you're the victims of his tax crimes because you pay your fair share of taxes and he doesn't . . . convict him so he doesn't get away with victimizing you and me, and every other honest taxpayer." The undersigned counsel can locate no reported criminal tax case, nor has he participated as trial counsel in one, where a prosecutor went this far in opening statement to irreparably prejudice the jury and deny the defendant a fair trial. Under any standard of review, the Constitution of the United States and our shared commitment to fundamental principles of fairness and justice impel reversal and remand for a new trial.

A. Invoking the Pecuniary Interests of the Jurors as Victimized Taxpayers and Appealing to Class Envy and Economic Bias was Deliberate, Unprofessional, and Highly Improper.

Invoking the pecuniary interests of jurors as taxpayers is unprofessional and highly improper: "We view the prosecutor's pitch [to the jurors' pecuniary interest as taxpayers] as an unprofessional and highly improper appeal to the passion and

prejudices of the juror." *United States v. Smyth*, 556 F.2d 1179, 1185 (5th Cir. 1977) (citing *Handford v. United States*, 249 F.2d 295 (5th Cir. 1957)); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 5.8(c) (1972)). The prohibition against this highly improper argument is so well settled that violations obtain universal condemnation: "Remarks invoking the individual pecuniary interests of jurors as taxpayers are *universally viewed as improper*." *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007) (emphasis added) (citing *United States v. Schimmel*, 943 F.2d 802, 806 (7th Cir. 1991)); *United States v. Blecker*, 657 F.2d 629, 639 (4th Cir. 1981)); *United States v. Lotsch*, 102 F.2d 35, 37 (2nd Cir. 1939)).

Yet that is how the trial of Jerry Marchelletta, Jr. began, with the prosecution's opening "statement" – an outrageous and highly improper diatribe so loaded with impermissible argument that a full exegesis would occupy this entire brief. The prosecution's deliberate, repeated, and flagrant misconduct irreparably tainted the entire trial proceeding, and prejudiced Marchelletta, Jr.'s substantial rights by creating a reasonable probability of a different outcome but for the misconduct – a probability that casts a haunting shadow over the fairness and integrity of, and public regard for, this federal criminal tax trial.

At both the beginning and end of this unique specimen of opening statement misconduct, the prosecutor told the jurors that Marchelletta, Jr. had committed tax

crimes against them. At the very outset, after laying a brief argumentative foundation with impermissible phrases like "cooking the books" and "accounting tricks," and deploying economic envy words such as "mansions," "custom clothes," and "multi-million," the prosecution made crystal clear to the jurors what important personal stake each and every one of them had in Marchelletta, Jr.'s guilt or innocence: "[The defendants] conspired to file even more massively false returns in 2001, that all of those things [the emblems of Marchelletta's lavish lifestyle previously recounted to them] were crimes, *crimes against the United States* ***and its taxpayers***." (Vol. 17, Doc. 205, p. 11:14-16) (emphases added).

Then, at the very end of this impermissible opening harangue – apparently to remove any doubt that the jurors understood and would follow the initial appeal to their pecuniary interest as victimized taxpayers – the prosecutor emphatically emphasized *again* to the jury that they were victims of Mr. Marchelletta's alleged tax crimes: "And it is the United States here that is the victim of this case, the United States ***and its taxpayers***." (Vol. 17, Doc. 205, p. 28:1-3) (emphases added). The prosecutor told the jurors in opening statement that Marchelletta, Jr. had committed crimes against them, and that he had profited handsomely with his lavish lifestyle at their direct expense as victimized taxpayers.

Moreover, each of these highly improper statements was closely preceded by other improper statements plowing the impermissible field of jury prejudice in

which to grow the infective weeds of direct invocation of the jurors' pecuniary interest as victimized taxpayers. For example, prior to the first improper invocation the prosecutor improperly argued to the jury that: "You're here because they wanted to live a life-style that their success afforded, but they didn't want to pay the taxes, didn't want to follow the rules everyone else has to follow." (Vol. 17, Doc. 205, p. 10:5-8). Then immediately preceding the concluding improper invocation, the prosecutor impermissibly urged that: "Ladies and gentlemen, nobody likes to pay taxes, and lots of smart people would change the system if they could. But that's not what this case is about. This case is about defendants who knew the rules and didn't follow the rules because they didn't want to be covered by the same rules that everyone else does." (Vol. 17, Doc. 205, p. 27:16-21). The "everyone else" that had to follow the tax rules and pay tax included the jurors, of course, and magnified the immediately subsequent and direct invocations of the jurors' pecuniary and personal interest as the taxpayer-victims of Marchelletta's alleged crimes.

All of these impermissible appeals to class and economic envy, argument regarding what the defendants knew and didn't know about the law, and argument that Mr. Marchelletta "didn't want to follow the rules everyone else has to follow," were darkly sandwiched between the beginning and concluding invocation of the jurors' pecuniary and personal interest as the taxpayer-victims of Marchelletta's

alleged crimes – in a criminal *tax* case, no less, and in opening statement. As the Supreme Court has observed:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial . . . . Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument.

Arizona v. Washington, 434 U.S. 497, 513 (1978).

B. The Prosecutor's Unprofessional and Highly Improper Opening Statement Arguments Constituted Plain Error Under this Circuit's Controlling Precedent, Substantially Affected Marchelletta, Jr.'s Substantial Rights, and Destroyed any Vestige of a Fair Trial.

Whether a prosecutor's improper statements constitute reversible error is ordinarily governed by a two-part test. The appellate court must determine first "whether the remarks were improper;" and second, "whether [the remarks] prejudicially affected the defendant's substantial rights." *United States v. Lacayo*, 758 F.2d 1559, 1565 (11th Cir. 1985) (citing *United States v. Zielie*, 734 F.2d 1447, 1460 (11th Cir. 1984)).

The plain error standard governs review here, however, because trial counsel did not object to the prosecutor's prejudicial misconduct, nor did the district court rebuke it. *See* Fed. R. Crim. P. 52(b). "Under plain-error review, the defendant

has the burden to show that 'there is (1) error (2) that is plain and (3) that affect[s] substantial rights.'" *United States v. Lejarde-Rada*, 319 F.3d 1288, 1290 (11th Cir. 2003) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). An error is "plain" if "it is obvious and clear under the current law." *United States v. Eckhardt*, 466 F.3d 938, 948 (11th Cir. 2006). A defendant's substantial rights are affected if the error affected the outcome of the proceedings; that is to say, but for the error there is a reasonable probability of a different result, a probability sufficient to undermine confidence in the trial's outcome. *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005). In turn, "[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id*. (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)). In sum, under plain error review the silent defendant has the burden "to show the error plain, prejudicial, and disreputable to the judicial system." *United States v. Von*, 535 U.S. 55, 65 (2002). Here, all three prongs are squarely met, if not exceeded.

1. The Prosecutor's Highly Improper Invocation of the Jurors' Pecuniary Interests as Victimized Taxpayers Constituted Plain Error.

The prosecutor's deliberate and repeated invocation of the pecuniary interest of the jurors as victimized taxpayers was plain error under this Circuit's controlling

precedent: "We view the prosecutor's pitch [to the jurors' pecuniary interest as taxpayers] as an unprofessional and highly improper appeal to the passion and prejudices of the juror." *Smyth*, 556 F.2d at 1185. When "[a] reference invites the jury to judge the case upon standards and grounds other than the evidence and law of the case, [it] is thus objectionable and improper." *United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997). The rule governing review of improper arguments is to "determine the probable effect the improper comment had on the jury." *United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985) (citing *United States v. Young*, 470 U.S. 1, 12 (1985)). Since pecuniary interest would necessarily disqualify a prospective juror from service, it is patently improper to make an appeal to that interest, *even in closing argument*. *United States v. Trutenko*, 490 F.2d 678, 679 (7th Cir. 1973) (emphasis added). Every other Circuit to address the issue concurs. *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007) (emphasis added) (citing *United States v. Schimmel*, 943 F.2d 802, 806 (7th Cir. 1991)); *United States v. Blecker*, 657 F.2d 629, 639 (4th Cir. 1981)); *United States v. Lotsch*, 102 F.2d 35, 37 (2nd Cir. 1939)).

2. The Prosecutor's Misconduct Irreparably Prejudiced the Jurors Against the Man They Were Told Committed Tax Crimes Against Them.

Mr. Marchelletta, Jr.'s substantial rights were affected, as the inevitable result of the prosecutor's highly improper "bookend" appeal to the jurors' personal

and economic self-interest as victimized taxpayers in opening statement: the universal condemnation of this specific type of improper statement in and of itself strongly counsels this conclusion. But here, in a criminal *tax* case, the irreparably prejudicial affect cuts to the heart of even the perception of a fair trial, where the precise question before the jury is whether the defendant committed tax crimes, and the jurors have been told the defendant committed those precise crimes *against them*.

The jurors were not asked, as in the impermissible "Golden Rule" argument that obtains quick reversal on appeal, to merely place themselves in the position of a tort victim, or to think about what it would mean to them if someone they knew was a victim of the crime charged against a criminal defendant. *See Ivy v. Sec. Barge Lines, Inc.,* 585 F.2d 732, 741 (5th Cir. 1978) (reversing and remanding); *Cooper v. Miami Dade County*, 2004 WL 2044288 (S.D. Fla. July 9, 2004) (reversing and remanding). Here, and much worse, the jurors *are* the victims, and they were told that in opening statement. And as the High Court has observed regarding improper opening statements, even issuing curative instructions to the jury, disciplining counsel, or removing counsel from the trial – none of which were done by the district court here – "will not necessarily remove the risk of bias . . . " *Washington*, 434 U.S. at 513.

3. This Case was a Close Call, with Split Verdicts as to both Marchelletta, Jr. and Kottwitz, in a Complex Tax and Conspiracy Case Centering on the Proper Classification and Reporting Timing of Distributions to Shareholders of a Closely-Held Corporation.

It cannot be said that, at all events, the evidence of guilt was so overwhelming that there was no reasonable probability of a different trial outcome if the prosecutor's misconduct could be shorn from the trial and the jurors' minds. "'If the case against defendant had been strong, or, as some courts have said, the evidence of his guilt overwhelming, a different [harmless error] conclusion might be reached.'" *Handford v. United States*, 249 F.2d 295, 298-99 (5th Cir. 1958) (reversing and remanding for new trial based upon U.S. Attorney's argument that he had "too many of his friends" and "his friends' children get run over, up and down the highway," in an unpaid-tax whiskey case) (citing *Berger v. United States*, 295 U.S. 86, 89 (1935)) (other internal quotations omitted)); *see also Buttermore v. United States*, 180 F.2d 853, 856 (6th Cir. 1950) (finding harmless error, but opining that: "If the case against appellant had been a weak one another course might have been justified.") Here, the case was a very close call, as evidenced by the jury acquitting Mr. Marchelletta, Jr. on Count II of the Indictment – the allegation that he filed a false and fraudulent return for tax year 1999. Nor was there any "softening of the impact by instructions to the jury to disregard" the

highly improper argument, the same defect that the *Handford Court* relied upon in reversing and remanding for a new trial in that case. *Handford*, 249 F.2d at 299.

Furthermore, in a complex tax prosecution that centered on the classification, timing, and proper reporting of distributions to shareholders of a closely-held corporation, there is undoubtedly a reasonable probability that but for the prosecutor telling the jury they were victims of Marchelletta, Jr.'s alleged tax crimes, the jury would have acquitted on other counts in addition to Count II. This was no simple "who shot John" case with overwhelming evidence of who shot John; indeed, unlike most tax trials which are easily resolved by recourse to basic financial reconciliations and tax return analysis, this complex federal criminal tax and conspiracy trial featured days of wearying tax computation testimony from IRS Revenue Agents, Certified Public Accountants, expert witnesses, and other tax accounting professionals. Whether or not "John" even got shot was at issue during this lengthy trial.

Moreover, this type of tax and conspiracy case is almost always a close call, where willfulness and intent are robustly in play and the jury is required to draw multiple inferences from the evidence to determine if the prosecution has met its burden beyond a reasonable doubt as to the critical *mens rea* element in a criminal tax case – as opposed to more "straightforward" federal criminal trials alleging violent crime, drug dealing, bank robbery, and the like, where if the government

proves up the direct "facts" of the alleged crime, there isn't much doubt the defendant intended to commit the crime. For example, if the government puts on eyewitness testimony identifying a defendant as the bank robber who approached the teller with a gun and demanded money, the defendant would not be heard to say: "Well, yes . . . that was me, but I didn't *intend* to rob the bank." It simply isn't possible to "accidentally" rob a bank, or to rob a bank without the requisite willfulness.

By definition, however, tax cases are fundamentally different. The rules are complicated, and even savvy businessmen are wise to rely upon tax professionals like accountants and CPAs to determine the proper classification of revenue streams, distributions, and expenses, and then to prepare returns for execution and filing. Running a successful business and mastering the Internal Revenue Code's Byzantine intricacies are two decidedly different enterprises. And that was the case here, with the jury being called upon to determine whether Marchelletta, Jr. *knew*, as a subjective matter, that the distribution classifications and return reporting timing was incorrect, as a function of the applicable tax law applied to Circle's complex financial facts. When a case is close, as this case was given the split verdicts as to Mr. Marchelletta, Jr. and co-defendant Kottwitz, a prosecutor's repeat and deliberate invocation of the jurors' pecuniary interests as victimized taxpayers, made during opening statement during a criminal tax case, no less,

commands reversal and remand for a new trial. A decent respect for fair trials, the integrity of judicial proceedings, and public regard for our criminal justice system impels this conclusion.

4. The Prosecutor's Outrageous Misconduct Destroyed Any Vestige of a Fair Trial.

Finally, as the Seventh Circuit has noted, since pecuniary interest would necessarily disqualify a prospective juror from service, it is patently improper to make an appeal to that interest, *even in closing argument*. *United States v. Trutenko*, 490 F.2d 678, 679 (7th Cir. 1973) (emphasis added). Here, Marchelletta, Jr. was judged by twelve jurors who would have been stricken for cause from the *venire* if they believed, much less were told by the prosecutor during *voir dire*, that they were victims of his alleged tax crimes. Where our law would completely disqualify veniremen under these circumstances from ever serving on Marchelletta, Jr.'s jury in the first instance, how can it be reasonably said that the jurors' judgment can be trusted, once seated and then infected by the prosecutor's highly improper appeal to taxpayer-victim status at the very outset of the case? It is simply impossible to conceive a more unfair trial than one in which you are judged by the victim(s) of your alleged crimes. The mere statement of the proposition is breathtaking, particularly given our venerable, sacrosanct tradition of impartial judges and juries. The prosecutor's misconduct did not just "seriously affect," but

completely undermined any responsible notion of the fairness, integrity, or public reputation of this federal criminal trial proceeding.

When the prosecutor shamelessly browbeat the jury in opening statement with class and economic envy; impermissibly argued about what the defendants knew about tax law and argued ultimate conclusions about the defendants' greedy motives; and then – in an outrageous display of arrogant disregard for universally condemned improper argument – pitted the jurors directly against the defendant by telling them they were victims of the defendants' alleged tax crimes, the entire trial proceeding was cast into unsalvageable disrepute. The prosecutor's misconduct was deliberate, as evidenced by the carefully structured bookend invocations of the jurors' pecuniary interests as victimized taxpayers, and in between, describing in detail all of the unusual and expensive things Mr. Marchelletta, Jr. purchased, impermissibly appealing to economic envy, and then inviting the jury to conclude that this lavish lifestyle was borne on their backs as victimized taxpayers.

II. THE TRIAL COURT'S REFUSAL TO GIVE DEFENDANT'S REQUESTED JURY INSTRUCTIONS ON RELIANCE ON ACCOUNTING ADVICE WAS REVERSIBLE ERROR UNDER CONTROLLING CIRCUIT PRECEDENT.

The Marchellettas requested an instruction on the good faith reliance upon accountant. (Vol. 1., Doc. 81, Ex. A.) The Marchellettas' proposed instruction was numbered 15 of Doc. 81. *Id*., p. 26. At the charging conference after the

evidence was presented, this instruction was denied for the reasons set forth by the court:

> I find that the defense of good faith reliance on an expert's advice is designed to refute the government's proof that a defendant intended to commit an offense, ***and to succeed*** the defendant ***must show***, one, that he fully disclosed all relevant facts to the expert and, two, that he relied in good faith on the expert's advice. That's from U.S. v. Johnson, 730 F 2d 683, an Eleventh Circuit Case.

(Vol. 28, Doc. 212, 1200:3-9) (emphases added).

The court apparently believed a defendant must persuade the court of the predicate facts for the defense before the jury is even permitted the instruction on this issue of law. The court wrongly assumed that the jury instruction was an affirmative defense, improperly concluding that the defendant must prove the defense to the court before the jury can even decide if the defense applies.

In short, the court confused the standard, misapprehending this Circuit's prior cases distinguishing between what the jury must decide in order for the defendant "to succeed," as opposed to when the jurors should be instructed on the issue for their ultimate deliberations as to guilt or innocence. The district court's unfortunate but serious misapprehension carried grave consequences for Marchelletta, Jr., by removing his core theory of defense from the jury's consideration and contravening this Circuit's longstanding precedent.

"It has long been established in this Circuit that it is reversible error to refuse to charge on a defense theory for which there is an evidentiary foundation and

which, if believed by the jury, would be legally sufficient to render the accused innocent." *United States v. Edwards*, 968 F.2d 1148, 1153 (11th Cir. 1992). A "defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense. *See United States v. Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994); *see also Bursten v. United States*, 395 F.2d 976, 981-82 (5th Cir. 1968).

"The law is clear that the defendant is 'entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility.'" *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (quoting *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986) (quoting *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972) (original emphasis in Lively)); *see also United States v. Strauss*, 376 F.2d 416, 419 (5th Cir. 1967) ("It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence." (citing *Perez v. United States*, 297 F.2d 12 (1961)). As long as there is some foundation in the evidence and legal support, the jury should be instructed on a theory of the defense. *United States v. Orr*, 825 F.2d 1537, 1542 (11th Cir.1987).

A. The Jury, Not the District Court, Must Decide Whether a Defendant Fully Disclosed all Relevant Facts to the Tax Professionals and That the Defendant Relied Upon Them in Good Faith.

Colloquially known in this Circuit as the *Bursten* instruction after the seminal case that established the instruction, circuits across the country for more than four decades find it reversible error to refuse to give an instruction on good faith reliance on a professional where any evidence at all exists concerning the defense. *Bursten*, 395 F.2d at 981-82; *see e.g.*, *United States v. Platt*, 435 F.2d 789, 792 (2nd Cir. 1970); *United States v. Pechenik*, 236 F.2d 844, 846-47 (3rd Cir. 1956); *United States v. Mitchell*, 495 F.2d 285, 287-88 (4th Cir. 1974); *United States v. Duncan*, 850 F.2d 1104, 1117-18 (6th Cir. 1988); *United States v. Phillips*, 217 F.2d 435, 440-41 (7th Cir. 1955); *United States v. Brooksby*, 668 F.2d 1102, 1105 (9th Cir. 1982).

The reliance defense explains a particularized and unique defense not easily known to any jury. The reliance defense instruction explains to the jury which facts they must find before they find criminal intent in the intricately complicated world of criminal tax and accounting treatment of revenue streams and expenses with issues implicating corporate entities and individual allocations. The facts the *jury must find* include disclosure of relevant facts to a financial professional and good faith reliance thereon. The law does *not* require the court, itself, be satisfied the defendant made full disclosure or relied in good faith; those are questions for the

jury, not the judge. The judge must only find any scintilla of evidence of any kind concerning professional involvement and potential reliance from the trial record, and then properly instruct the jury for its guided determination.

When the record reveals any evidence of those facts, no matter how "weak, insufficient, inconsistent or of doubtful credibility," *Opdahl*, 930 F.2d at 1535, no matter whether "believable or sensible," *Strauss*, 376 F.2d at 419, "the trial court must instruct the jury on the defense of good faith reliance on counsel." *United States v. Eisenstein*, 731 F.2d 1540, 1544 (11th Cir. 1984).

Even where "there is ample evidence showing the defendant did not fully disclose the relevant facts" the "question of good faith reliance" was solely a "matter for the jury to determine upon proper instructions." *United States v. Baldwin*, 307 F.2d 577 (7th Cir. 1962). Even where there is "substantial doubt about the circumstances of his legal advice" and reason to believe a defendant "did conceal material information" from the professional relied upon, the issue of reliance remains solely for the jury. *United States v. Walters*, 913 F.2d 388, 391-92 (7th Cir. 1990). As the court explained, whether the defendant made full disclosure or relied in good faith on professionals "must be resolved by the jury – not the court." *Id*. at 392. Before the instruction can be denied, there must be "no evidence in the record" the defendant sought advice of a professional, received advice or followed the advice. *United States v. Durnin*, 632 F.2d 1297, 1301 (5th Cir. 1980).

B. The District Court Applied the Wrong Standard to When the Reliance Instruction Should be Given.

This Circuit noted that in determining the propriety of whether the evidence warrants an instruction, it is not up to the trial judge to evaluate or screen "the evidence supporting a proposed defense, and upon such evaluation decline to charge on that defense" because in doing so "he dilutes the defendant's jury trial by removing the issue from the jury's consideration." *Bursten*, 395 F.2d at 981 (citing *Bryan v. United States*, 373 F.2d 416 (5th Cir. 1967)); *see also Strauss*, 376 F.2d at 419.

It is unimportant if the evidence is "either strong or weak," the facts in support thereof appear "believable or sensible." *Id.* at 419. Indeed, the "jury did not have to believe the defense" nor the court believe the jury would believe it, but the jury must be "given the opportunity" to consider it. *Id.*

As this Circuit explicated long ago:

> We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

Id.

The proper standard is whether a reasonable juror, based on any evidence whatsoever, could conclude that the defendants believed their actions were lawful based on the involvement and reliance upon a financial professional, such as a bookkeeper, accountant, or attorney. The prosecution's entire case focused on the intimate decision-making process between the Marchellattas, father and son, and their bookkeeper and outside CPA. The principal issue for the jury was whether they relied upon the bookkeeper and CPA in good faith to properly manage Circle's financial and tax affairs. The jury, however, never got that question, because the court refused to instruct them on the issue of reliance.

A properly instructed jury would have been told they must find the government proved beyond a reasonable doubt that the defendants did not believe their actions were lawful due to the involvement of accounting professionals. In turn, when deciding whether to give the instruction, the district court needed only to assess: (a) whether *a juror* could find *any evidence*, even evidence the court found incredulous and dubious, that could lead a juror to conclude that the defendant provided all material facts to an accounting professional; and (b) whether *a juror* could find *any evidence* that could lead the juror to conclude the defendant relied in good faith upon that professional's accounting decisions.

The district court misapplied this Circuit's precedents, applying a sufficiency of the evidence standard, which evaluates whether a jury could reject a

reliance defense when so instructed, not with whether the instruction should be given in the first instance. As this Circuit emphasized for more than four decades, the only issue in deciding to instruct the jury on the issue is whether the slimmest possible evidence exists concerning the issue. *See Strauss*, 376 F.2d at 419 (district court's failure to understand distinction between sufficiency of the evidence analysis and jury instruction analysis required reversal in tax evasion case, where defense requested instructions regarding value of property and corporate existence were not given.) Here, as in *Strauss*, reversal is required.

The trial court utilized the following incorrect standard for whether to permit the jury instruction. First, the defendant had to "refute" the allegation of intent, and then, in order "to succeed," the defendant: (a) "must show" to the court that he fully disclosed all material facts to the financial expert; and (b) "must show" to the court that he relied in good faith on expert advice for his conduct. This went far beyond harmless error; it was plain error. As in *Strauss*:

> The proper standard was not met here. The jury did not have to believe the defenses, but it should have been given the opportunity. This is true even if the defense is fragile. A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge.

Strauss, 376 F.2d at 419.

C. Due Process Principles and the Right to Remain Silent Underpin Circuit Precedent that the Good Faith Reliance Instruction Must be Given if there is Any Supporting Evidence in the Record.

Although axiomatic, it bears restating in the context of jury instruction charging standards: the prosecution bears the burden of proof on all elements of the alleged criminal offense, while the accused bears no burden to produce any evidence whatsoever. The due process clause, the right to not to testify, and the right not to present any defense witnesses at all require that evidence production burdens be so apportioned. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995). Hence, in criminal tax cases, a "low threshold [is] required" for such good faith instructions. *United States v. Morris*, 20 F.3d 1111, 1114 n.2 (11th Cir. 1994).

The burden is always on the government to negate a good faith belief, not the defendant to prove his reliance or good faith. *Morris,* 20 F.3d at 1115 ("*Cheek* instructs that the government must carry the burden including negating any claim of good faith") (internal quotations omitted). The fact that a defendant who presents no evidence is still entitled to the instruction even when the person relied upon was an alleged co-conspirator is well established. *See United States v. Wesley Trent Snipes*, Case No. 5:06-cr-00022-WTH-GRJ (M.D. Fla. 2008) (where Judge Hodges, who drafted the Eleventh Circuit's model jury instructions, gave the reliance instruction based on the mere fact Snipes was represented by an

accountant at some point, with the issues of full disclosure and good faith given to the jury for determination); *see also* Pattern Jury Instructions, Eleventh Circuit, Special Instruction No. 18 (noting that "the burden of proof is not on the Defendant to prove good faith, of course, since the Defendant has no burden to prove anything.")

This Circuit has long reiterated the fact that a defendant need not testify or present any evidence to warrant the instruction. *See United States v. Curry*, 681 F.2d 406, 416, n.25 (5th Cir. 1982); *see also United States v. Foshee*, 578 F.2d 629, 634 (5th Cir 1978) (burden always on the government prove lack of good faith which is a "complete defense); *see also Coleman v. United States*, 167 F.2d 837, 839 (5th Cir. 1948) (noting often the only available defense is intent). The defendant can never bear the burden of proof on this defense. *See United States v. Phillips*, 217 F.2d 435, 440-441 (7th Cir. 1955) ("This argument contravenes a fundamental proposition of law, that is, that there was no burden on the defendant to show good faith.")

Judge William Terrell Hodges of the Middle District of Florida properly applied the good faith reliance instruction in the case of the *United States v. Wesley Trent Snipes*, despite the fact the defense did not call a single witness in the case, and even though those relied upon were alleged co-conspirators, understanding that the weight of the evidence is for the jury to balance, not the court. *See United*

States v. Wesley Trent Snipes, Case No. 5:06-cr-00022-WTH-GRJ (M.D. Fla. 2008); *see also Eisenstein*, 731 F.2d at 1543-44 (approving similar good faith instruction for reliance on counsel); *see also United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981) (holding that failure to give good faith instruction as a theory-of-defense charge, when requested to do so, is error if there is any evidentiary foundation to support the Defendant's claim). The fact the evidence comes from prosecution witnesses changes nothing. *See Phillips*, 217 F.2d at 440-41.

Shifting the burden to the defendant, as the district court apparently did, "would effectively eviscerate the accused's right not to testify in any criminal matter in which good faith was at issue." *Curry*, 681 F.2d at 416 n.25. As this Circuit repeatedly emphasized, "it must be remembered" the burden to prove intent and negate good faith lies solely on the government. *Foshee*, 578 F.2d at 634. This Circuit's model instruction emphasizes that very fact: "The burden of proof is not on the Defendant to prove good faith, of course, since the Defendant has no burden to prove anything." Pattern Jury Instructions, Eleventh Circuit, Special Instruction No. 18.

The district court below incorrectly concluded that whenever there is evidence in the record upon which inferences can be drawn both in favor of disclosure and reliance, and against disclosure and reliance, then the court must deny the defendant the reliance defense and cannot give the reliance instruction to

the jury unless the court is personally satisfied the defendant has shown *the court* it has the better of the evidentiary inferences.

The burden is always on the government, never the defense; there must only be any evidence, not the most persuasive evidence, of disclosure and compliance for the reliance instruction to be given; and the issue of the evidence must be seen through what a juror could conclude, not what the court is satisfied has been "shown."

The court's use of the term "show" came from *Johnson*. *United States v. Johnson*, 730 F.2d 683, 686 (11th Cir. 1984) (citing *United States v. Smith*, 523 F.2d 771 (5th Cir. 1975)). Looking closely at *Johnson*, however, the use of the word "show" was not intended to displace the general rule about when instructions are to be given, mainly by putting an evidentiary burden or "showing" on the defendants before they get an instruction.

The *Johnson* defendants were charged with making false statements to a federal government agency. The defense presented in *Johnson* made good faith irrelevant to the analysis: "The flaw in the defendants' argument is that no expert advice was given to the defendants on which they relied." *Id*. The defendants' defense was a lack of knowledge that the information presented on the Small Business Administration and Farmers Home Administration forms was false, not that the defendant's relied on their attorney to properly fill out the government

forms. *Id*. at 686-87. The necessary "showing" *Johnson* required was one of logical relevance to the defense, not one involving sufficiency of the evidence.

The *Eisenstein* Court also used the word "show," but applied it properly in that the mere presentation of ***any*** evidence from the record showing the issues of disclosure and reliance are present: "When the defendant presents evidence that he disclosed all relevant facts to his attorney and relied on the attorney's advice based on the disclosure, the trial court must instruct the jury on the defense of good faith reliance on counsel." *Eisenstein*, 731 F.2d at 1544. The instruction itself sets forth "full disclosure" as a factual question for the jury as a predicate to finding good faith, not a question for the court. *Id.*

The Eleventh Circuit simply meant that the defendant, at the time of the charging conference, articulate what evidence exists in the record for the issue to be present in the trial, sufficient for the court to explain to the jury how they are to resolve that issue; not that the defendant bears the burden of proof on the issue nor that the defendant must prove to the court's satisfaction that the reliance defense has succeeded, or will "succeed."

D. Substantial Evidence in the Record Supported the Theory of Defense Reliance Instruction.

The evidence may be "weak, insufficient, inconsistent," of "doubtful credibility," and dubious to the court, yet the instruction has to be given where *any* evidence exists – be it circumstantial, or indirect, or from the government's own

evidence. *Morris*, 20 F.3d at 1116 (emphasis added); *see also Opdahl*, 930 F.2d at 1535; *United States v. Banks*, 988 F.2d 1106 (11th Cir. 1993).

As this Circuit and sister circuits concur, the "very low threshold" of evidence needed for the jury to be instructed on how to decide this issue can be met whenever there is evidence, however slight or disputed, that a defendant entrusted accounting decisions to financial professionals, whether corporate bookkeepers, professional auditors, or outside CPAs. The court must inform the jury of the reliance defense to protect the due process rights of the defendant. *See United States v. Kim*, 884 F.2d 189, 193 (5th Cir. 1989) ("The judge properly charged the jury on the defense theory of reliance," even though the defendant was only a "walk in customer" of an accountant to whom the evidence showed the defendant did not fully disclose information); *see also Pechenik*, 236 F.2d at 846-47 (evidence a defendant "left the books, bookkeeping and preparation of tax returns to the bookkeeper" warrants the instruction.)

When a defendant merely presented evidence that financial books were kept internally by a bookkeeper and reviewed by outside CPAs, then his requested reliance jury instruction was required. *Morri*s, 20 F.3d at 1114. The same was true here. Merely having a bookkeeper involved in the accounting justified a good faith reliance instruction. See *Berkovitz v. United States*, 213 F.2d 468, 472 (5th Cir.

1954) (a defendant depending upon a bookkeeper acted in good faith). The same applied here.

Hence, mere testimony that a financial professional advised a taxpayer concerning the matter, without anything more, required the instruction. *Platt*, 435 F.2d at 791. Here, evidence aplenty documented the Marchellettas sought and paid for the accounting decisions of corporate bookkeepers, outside auditors, and CPAs.

Evidence that "invoices and payments were taken care of by the bookkeeper in the ordinary course of business" warranted the instruction. *See Pechenik*, 236 F.2d at 847. The same applied here.

Evidence the defendant did not give the bookkeeper directions to change an expense of an item of account to another warranted the instruction. *See id*. The same applied here.

Evidence the defendant did not refuse to give information and did not interfere with activities of bookkeeper or accountant warranted the instruction. *See id*. The same applied here.

The fact that a codefendant may be the person relied upon does not change the necessity of the instruction. *See Duncan*, 850 F.2d at 1117 ("In addition, we hold that there was sufficient evidence presented that the District Court should have instructed the jury on taxpayer Duncan's theory that he lacked criminal intent

because he relied in good faith upon the professional opinion of a certified public accountant, codefendant Downing").

Any evidence a defendant did not "obstruct the flow of information" necessary to make accounting judgments requires the instruction. *United States v. Head*, 641 F.2d 174, 180 (4th Cir. 1981). The same applied here.

Beyond that, there was abundant evidence of Marchelletta, Jr.'s reliance, with testimony and exhibits detailing the extensive involvement of accounting professionals, including the corporate bookkeeper and outside CPAs in the returns filed and tax actions taken. There was evidence in the record the defendants made full disclosure and acted in good faith; there was also evidence in the government's case-in-chief that *challenged* their disclosure and good faith. It was for the jury to decide whether the defendants had in fact made full disclosure and acted in reliance thereupon and conformity therewith, a decision the district court stripped them of.

The first and foremost is a document introduced by the government itself in which Jerry Marchelletta, Jr., on behalf of Circle Industries USA, Inc., as its president, signed a letter to CPA Gary Schwartz ("Schwartz") which said: "to the best of my knowledge and belief . . . I have made available to you all: a. Financial records and related data. b. Minutes of the meetings . . ." (Gov't Exhibit 427.10, p. 1) (introduced by the government in direct examination of Schwartz at Vol. 22,

Doc. 99, p. 52:9). Furthermore, upon cross-examination by the defense, Schwartz admitted the Marchellettas relied on his professional advice. "Q. And you're the professional, you're the CPA. [The defendants are] relying on that. That's your audit function, isn't it, sir? A. Yes. And – can I make a statement?" *Id*., p. 185:3-5.

Schwartz's statement went on to describe why he discussed the tax matters with Defendant Kottwitz more so than with the Marchellettas. *Id*., p. 185:7-186:1. And as the defense cross-examination continued, Schwartz testified: "he [Marchelletta Junior] knew that Terry [Kottwitz] and I were doing the audit together." *Id*., p. 186:20-21. Schwartz continued: "Mr. Marchelletta was very well aware that the audit was being done. And he just seemed basically, really, not to really care about the numbers." *Id*., p. 187:10-13. Schwartz's testimony was saturated with facts from which a jury could infer the defendants relied on their professional CPA. The citations are set forth in the footnote below.[3]

One of the most significant issues was Circle's treatment of the consulting income from Nastasi. Originally, Circle classified it as income, but it was CPA Schwartz who decided to change its classification to a loan. (*Id*., pp. 120:19-

[3] (Vol. 22, Doc. 99, pp. 32:6-7; 32:16-19; 35:2-6; 37:14-16; 39:3-5; 46:20-47:1; 47:18-21; 56:15-18; 60:13-14; 65:9-11; 91:7; 98:10-15; 103:3-22; 120:19-121:4; 122:18-23; 123:7-10; 125:4-7; 125:10-14; 140:2-10; 144:23-145:20; 146:2-5; 161:24-25; 162:2-23; 163:22-164:24; 173:25-175:3; 175:19-21; 177:3; 178:12-18; 179:8-10; 181:22-182:17; 183:7-9; 184:1-15; 185:3-5; 186:6-9; 187:3-13.)

121:4.) As Schwartz related: "Well, what happened was it was first put into income and then the controller had told me that it was a return of capital, because upon the breakup of the companies, Mr. Marchelletta Senior was owed a lot of money. So, that's what – **that's what brought me to say that it should have been in note payable rather than income**." *Id*. (emphasis added). This transaction clearly shows the necessary predicate for the reliance on accountant instruction.[4]

As to building of the Marchellettas' respective homes, there is even evidence that CPA Schwartz noticed the accounts on the books and failed to inform Kottwitz or the Marchellettas about any accounting issues. *Id*., p. 144:23-15:20. These accounts had zero income and over a million in expenses. *Id*. Yet Schwartz did not question the Marchellettas or Kottwitz about them. There is a reasonable inference, an inference the Marchellettas and Kottwitz could have argued to the jury had the reliance instruction been given, that the CPA said nothing because the CPA believed nothing was wrong. The Marchellettas and Kottwitz had the right to argue that they justifiably relied on CPA Schwarz's auditing skills, a common situation where, by definition of an audit, the audited corporation and its officers

[4] Furthermore, as a result of this reclassification, CPA Schwartz admitted that he failed to inform Defendant Marchelletta, Senior, that this transaction affected his 2001 tax return which had just recently been filed, (Vol. 22, Doc. 99, pp. 181:22-182:17), even though he had it in mind, *id*., p. 183:7-9. Additional admission at *id*., p. 184:1-15.

rely upon what warnings or negative conclusions are drawn, or not drawn, by the accounting professional performing the audit.

The testimony of other witnesses besides CPA Schwartz also provided sufficient predicate evidence that Circle, Kottwitz, and the Marchellettas relied on their CPA auditors, such that the reliance instruction should have been given. The citations are set out in the footnote below,[5] but clearly show that substantial information was given to the CPAs, and that the CPAs provided guidance as to specific accounting decisions relevant throughout the case and material to the tax issues implicated.

E. Marchelletta, Jr.'s Defense was More than Substantially Impaired by Removing the Reliance Defense from Jury Consideration.

The denial of the good-faith reliance instruction on counsel foreclosed the opportunity for the Marchellettas to present their reliance theory to the jury. This instruction was a correct statement of law, no other statement within the

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[5] Through testimony of Robert Seay, the prior testimony from an arbitration hearing of Defendant Kottwitz: "We have an outside CPA firm to do our auditing." (Vol. 18, Doc. 206, p. 309:9.) Testimony of Circle's Accounts payable clerk Logan: CPAs Schleger and Schwartz got copies of the JM Reports, payables reports and general ledgers. (Vol. 20, Doc. 207, p. 424:21-425:7.) Logan's testimony: general ledger revisions discussed with CPAs. *Id.*, p. 431:10-12. CPA Schleger's testimony: CPAs were independent auditors. *Id.*, p. 497:12-23. Other significant testimony of Schleger. *Id.*, pp. 499:19-22; 501:22-504:4; 508:18-20; 510:3-9; 513:8-10; 518:23-25; 524:18-23; 530:15-19 (even CPA Schwartz did not know the tax effect of the death clause in the consulting agreement). Witness Diggs testified that CPA Schwartz was Circle's auditor. *Id.*, pp. 563:9-14. Diggs testified that Schwartz would direct journal entries. *Id.*, pp. 582:7-15; 583:4-14; 584:2-4.

instructions addressed the issue of reliance or informed the jury of its vitality, and the denial of the defense was at least as harmful as in comparable cases where appellate courts reversed convictions secured in such a tainted manner.

Sister circuits reverse more often in these cases, because district courts misapprehend the standard for giving reliance instructions out of proportion to most other legal issues. *See e.g.*, *United States v. Platt*, 435 F.2d 789, 791 (2nd Cir. 1970); *United States v. Pechenik*, 236 F.2d 844, 846-47 (3rd Cir. 1956); *United States v. Mitchell*, 495 F.2d 285, 288 (4th Cir. 1977); *United States v. Miller*, 658 F.2d 235 (4th Cir. 1981); *United States v. Head*, 641 F.2d 174, 180 (4th Cir. 1981); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988); *United States v. Walters*, 913 F.2d 388, 391-92 (7th Cir. 1990); *see also United States v. Baldwin*, 307 F.2d 577 (7th Cir. 1962); *United States v. Phillips*, 217 F.2d 435, 440-441 (7th Cir. 1955); *United States v. Brooksby*, 668 F.2d 1102, 1105 (9th Cir. 1982). And this is true whenever a district court denies the defense the right to present its theory of defense through proper instructions to the jury.[6]

[6] See e.g., *Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir. 1961) (theory of defense in this drug case should have been given); *United States v. Megna*, 450 F.2d 511 (5th Cir. 1971) (failure to give alibi instruction in Post Office burglary case was error); *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972) (failure to instruct regarding intent in case of assaulting a federal officer caused reversal); *United States v. Workopich*, 479 F.2d 1142 (5th Cir. 1973) (failure to give entrapment instruction in heroin case was error); *United States v. Taglione*, 546 F.2d 194, 198 (5th Cir. 1977) (failure to give "finder fee" theory of defense instruction in extortion case caused reversal); *United States v. Flom*, 558 F.2d

This was the core defense – the reason the Marchellettas had no criminal intent, evidenced by their securing the services of financial professionals to make the accounting and tax determinations for them concerning their revenue streams and expenditures, decisions dependent upon knowledge and expertise beyond their custom or ken as construction men. Denying them this critical instruction was the same as a directed verdict on their case.

> The proper standard was not met here. The jury did not have to believe the defenses, but it should have been given the opportunity. This is true even if the defense is fragile. A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge.

Strauss, 376 F.2d at 419.

1179, 1185 (5th Cir. 1977) (in prosecution for Sherman Act violations, theory of defense about "flow" of interstate commerce should have been given); *United States v. Timberlake*, 559 F.2d 1375, 1379 (5th Cir. 1977) (failure to give entrapment instruction in drug case was error); *Darland v. United State*s, 626 F.2d 1235 (5th Cir. 1980) (failure to give requested instruction on reputation evidence caused reversal); *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. 1981) (failure to give "intent to defraud the government" instruction was error); *United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981) (failure to instruct jury about "good faith" defense in mail fraud case involving sale of crude oil was error); *United States v. Daneh*y, 680 F.2d 1311, 1315 (11th Cir. 1982) (failure to give defendant's requested intent instruction required reversal); *United States v. Lively*, 803 F.2d 1124, 1125-26 (11th Cir. 1986) ("the district court erred in refusing to instruct the jury that once a co-conspirator becomes a government informer he can no longer be a member of the conspiracy"); *United States v. Banks*, 988 F.2d 1106 (11th Cir. 1993); *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995) (court erroneously refused defense instruction on a mistake of fact defense); *United States v. Gonzalez*, 122 F.3d 1383 (11th Cir. 1997) (reversed for failure to instruct on "lesser included" offense).

The district court's failure to give the reliance instruction denied Marchelletta, Jr. a fair trial: "Amid a sea of facts and inferences, instructions are the jury's only compass. Here, they were cast adrift. The court's failure to provide an instruction on Walter's theory of defense infected the fairness of his trial." *Walters*, 913 F.2d at 391-92. The same holds true here, where failing to do so offends due process and requires reversal. *Id.*

III. THE MARCHELLETTAS' RULE 29 MOTION WAS IMPROPERLY DENIED BECAUSE THE HOME CONSTRUCTION EXPENSES CIRCLE PAID ON BEHALF OF MARCHELLETTA, JR. COULD NOT HAVE BEEN A MATERIAL MISSTATEMENT ON THE TAX RETURN AS A MATTER OF LAW.

This case revolves wholly around Circle's distributions to Marchelletta, Jr. and how and when they should have been classified and reported respectively. The government's case fails as a matter of law as to all three counts of conviction, namely counts one, three and six, pursuant to 26 U.S.C. §§ 301 and 316(a) and the unanimous decision in *United States v. Boulware*, 128 S.Ct. 1168 (2008). No reasonable jury could have found Marchelletta, Jr. guilty of these alleged crimes because the "personal expenses" Circle paid on behalf of Marchelletta, Jr., could only have been taxable to Marchelletta, Jr. in 2001, not 2000. Whether a tax return contains a material misstatement must be determined *objectively*. Even if a defendant *intends* to make a material misstatement, if a material misstatement does not exist after an objective analysis of the tax return's accuracy, the defendant

cannot be guilty. *See Boulware v. United States*, 128 S.Ct. 1168, 1179 (2008) ("[I]ntent to make a distribution a taxable one cannot control . . ."). The only expenses at issue are those related to the home construction project and all but one of those expenses, as a matter of tax law, command they had to have been recognized in 2001.

A. The Jury Convicted Solely on the Home Construction Costs Marchelletta, Jr. Purportedly Omitted From His 2000 Tax Return and Rejected the Government's Contention That He Omitted the Circle Distributions Related to Personal Clothing and Entertainment Expenses.

The jury rejected the prosecution's contentions that Marchelletta, Jr. had understated income on his 1999 tax return by failing to include the $250,000 loan from George Gorman's company and the thousands of dollars of purported personal clothing and entertainment expenses, by acquitting him of the 1999 charge for filing a false and fraudulent tax return. The only reasonable inference regarding the convictions as to the 2000 tax year, therefore, was that the home construction costs that Circle satisfied on behalf of its owners were improperly omitted from Marchelletta, Jr.'s 2000 tax return. Indeed, had the jury determined that the purported personal clothing and entertainment expenses were improperly omitted, they would have had to convict on both 1999 and 2000, because the prosecution presented evidence that these expenses were omitted in both of those tax years.

The jury also rejected the government's contention that the $250,000 loan from George Gorman's company was improperly omitted as income from the 1999 tax return. As the Court instructed the jury: "The Government alleges that a $250,000 loan from an offshore corporation made to Jerry Marchelletta, Jr., in April 1999 was not a loan and should have been included by him as income for 1999." (Vol. 29, Doc. 213, p. 1-4.) When the jury acquitted Marchelletta, Jr. of filing a false and fraudulent tax return for 1999, they rejected the argument that this payment was improperly classified as a loan. Therefore, the only class of distributions at issue on appeal is those related to the construction of Marchelletta, Jr.'s home. The only reasonable interpretation of the jury's verdict was that they rejected the prosecution's contentions as to the $250,000 loan, the clothing expenses and the entertainment expenses that were allegedly omitted from Marchelletta, Jr.'s 1999 and 2000 tax returns, leaving the home construction costs as the sole basis for the jury's verdict related to Marchelletta, Jr.'s 2000 tax return.

B. The Vast Majority of Home Construction Costs Incurred During the 2000 Calendar Year Could Not Have Been Classified Until March 31, 2001 and Consequently, Could Not Have Been Included on Marchelletta, Jr.'s 2000 Tax Return as a Matter of Law.

There are two aspects to *Boulware*'s objective characterization rule as it applies to this case. The first is the most important: timing. In which tax year can, and should, a distribution be recognized? The second is equally important:

classification. Were the transactions compensation, loans, dividends, returns of capital, or gains from the sale of exchange of property? In other words, not only is it important *how* to classify the distribution, but also *when* to recognize the distribution. The answer to these questions as they relate to material misstatement element of tax crimes in this case must be determined objectively.

1. Distributions From Closely-Held Corporations to Their Shareholders Cannot Be Classified Until the End of the Corporation's Fiscal Year, and Any Imputations of Income to Shareholders Resulting From Those Distributions Cannot Be Realized Until That Date.

The Supreme Court issued its unanimous decision in *Boulware* on March 3, 2008, less than one month after Marchelletta, Jr.'s post-trial Motion for Judgment of Acquittal was denied. (Vol. 2, Doc. 134.) *Boulware* ultimately held that a defendant need not "show contemporaneous intent to treat diversions as returns of capital before relying on [26 U.S.C. §§ 301 and 316(a)] to demonstrate that no taxes are owed." *Boulware*, 128 S.Ct. at 1182. In other words, when determining whether a tax return contains a material misstatement, intent is irrelevant to the analysis. In this case, because it was impossible for Circle to classify the home construction costs paid out after April 1, 2000 until its fiscal year had closed the next year in 2001, those distributions could not be imputed to Marchelletta, Jr. as income for 2000, even *assuming* he had any bad intent.

Marchelletta, Jr. was convicted of filing a false and fraudulent tax return for the tax year 2000,[7] for aiding and abetting the filing of a false and fraudulent corporate tax return for the tax year ending March 31, 2001,[8] and for conspiracy to defraud the United States.[9] The disjunct between Marchelletta, Jr.'s and Circle's tax years is an everyday fact when dealing with closely-held corporation and their shareholders. Certain complexities can occur. For example, it is not only possible, but commonplace, that a year-2000 distribution may not be recognized on a shareholder's personal return until 2001 because the classification of that distribution is directly dependent on certain corporate circumstances occurring after the close of the individual's tax year, but before the end of the corporate fiscal year.

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[7] While proving a tax deficiency is not necessary to proving this crime, the Supreme Court applied *Boulware* to § 7206(1) criminal cases because "'the nature and character of the funds received can be critical in determining whether . . . § 7206(1) has been violated, [even if] proof of a tax deficiency is unnecessary.'" *Boulware*, 128 S.Ct. at 1178, n.9 (quoting 1. I. Comisky, L. Feld, & S. Harris, *Tax Fraud & Evasion*, ¶ 2.03[5], p. 21 (2007)). Consequently, the Supreme Court applied *Boulware* to § 7206(1) cases.

[8] *Boulware* also extends to § 7206(2) criminal cases because both §§ 7206(1) and 7206(2) both contain virtually identical language in their respective elements going to whether the tax return at issue was truthful. *Compare* "which he does not believe to be true and correct as to *every material matter*," 26 U.S.C. § 7206(1) (emphasis added), *to* "which is fraudulent or is false as to *any material matter*, 26 U.S.C. § 7206(2) (emphasis added).

[9] Examining the conspiracy's manner and means as alleged in the indictment after considering the transactions the jury determined *not* to be improper, also strongly suggests that this count rises and falls with the other two.

These "timing" issues are commonplace, as Randy Brown, a certified public accountant that prepared amended tax returns for the Marchellettas and Circle after the IRS had begun their investigation of this matter, testified:

> Q. . . . it happens from time to time in your experience, companies might advance monies in some way to a shareholder?
> A. It happens a lot, yes.
> Q. In terms of essentially loans?
> A. Loans or – and as in this case, credit card expenses that are personal in nature.
> Q. OK. So that money is advanced, and then it's adjusted at the fiscal year end to reflect what exactly it is. Is this going to be a loan that someone's going to repay or is this income or is this something else?
> A. That's correct.
> . . .
> Q. So, in taking a hypothetical, if you have payments that are made, credit cards, house construction, whatever, in one year, they're actually paid in one year, but because the company has its fiscal year that goes into the – in early part of the following year, the company might not make its decision as to what exactly these expenses are until the following year, and that's why you can report on the personal income taxes that money, even though it's spent in the one year, in the second year? Does that make sense?
> A. That's basically it, yes.

(Vol. 24, Doc. 100, pp. 117:1-12, 117:22-118:6) (strikingly, these comments were solicited by the prosecution during Randy Brown's direct examination).

As to the home construction distributions, Marchelletta, Jr.'s own words set forth his belief about how they were being handled when he testified at an arbitration hearing between himself and the general contractor supervising his home construction project:

> Q. In looking at the documents in this case, the checks that appear to be written are from The Circle Group and not either you or your wife. Was there some form of compensation to you?
> A. I believe it's shown as an employee loan.

(Gov.'s Exhibit 30, p. 13:23-14:2) (read into the record at Vol. 18, Doc. 206, p. 306:1-6).

While Marchelletta, Jr.'s intent is not determinative of how the transaction should ultimately be treated when objectively determining whether the 2000 tax return is truthful, the statement does show that Marchelletta, Jr. knew that transactions could be subject to multiple possible classifications. When Marchelletta, Jr. was asked about compensation, he indicated he believed they were characterized as loans. This was completely possible at the time, depending on how Kottwitz and CPA Schwartz handled Circle's year-end adjusting entries.

The Supreme Court recognized the difficulty facing closely-held corporations and their shareholders regarding how to classify transactions between these related parties when they cited *Truesdell v. Comm'r*, IRS Non-Docketed Service Advice Review, 1989 WL 1172952 (Mar. 15, 1989) in *Boulware*'s footnote 13:

> We believe a corporation and its shareholders have a common objective – to earn a profit for the corporation to pass onto its shareholders. Especially where the corporation is wholly owned by one shareholder, the corporation becomes the alter ego of the shareholder in his profit making capacity . . . . [B]y passing corporate

> funds to himself as shareholder, a sole shareholder is acting in pursuit of these common objectives.

Boulware, 128 S.Ct. at 1180, n.13.

This overlapping interest between closely-held corporations and its shareholders makes tax-effect classifications more difficult than would otherwise be present in a more traditional corporation-shareholder relationship and highlights the importance of an objective determination of the tax transactions.

2. Internal Revenue Code Sections 301 and 316(a) Govern the Timing of Classifications of Distributions From Corporations to Their Shareholders.

Distributions of property from a corporation to a shareholder with respect to its stock are governed by 26 U.S.C. § 301, which reads, in relevant part: "a distribution of property . . . made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c)." 26 U.S.C. § 301(a). In turn, subsection (c) can be summarized as follows: if the distribution is a dividend, the distribution will be part of gross income; if the distribution is not a dividend, the distribution will be applied against the stock's basis; and if no basis remains to consume the distribution, the remainder is considered a gain from the sale or exchange of property. 26 U.S.C. § 301(c). Property received that is subject to a loan is excepted because it is a distribution made with respect to stock.

Therefore, the several possible characterizations of a distribution for tax purposes are divided into two classes. The first class of distributions are those that

are not made with respect to the corporations stock, mainly, compensation and loans. *See* 26 U.S.C. § 301(a). The second class of distributions are those that *are* made with respect to a corporation's stock and those transactions include dividends via § 301(c)(1), returns of capital via § 301(c)(2), and capital or ordinary gains via § 301(c)(3). In turn, § 316(a) must be reviewed because that section defines "dividend."

Section 316(a) defines "dividend" as:

> any distribution of property by a corporation to its shareholders – (1) out of its earnings and profits accumulated after February 28, 1913 [ie. retained earnings], or (2) out of its earnings and profits of the taxable year (*computed as of the close of the taxable year* . . .) without regard to the amount of earnings and profits at the time the distribution was made.

26 U.S.C. § 316(a) (emphasis added).

The "dividend" definition clearly bars any determination of a transaction's eligibility to constitute a dividend until the end of the corporation's fiscal year because the determination of a dividend must be made *without regard* to the year-to-date earnings and profits at the time the distribution was made.

The same classification-timing rule applies to non-§ 301 transactions as described above. CPA Randy Brown's testimony set out above in sub-section 1, *supra*, references loans – a non-§ 301 transaction – confirming this conclusion. IRS RA Lesso's testimony does the same: "[N]othing's final until the financial statements are prepared." (Vol. 26, Doc. 101, p. 278:19-20.) Therefore, when

Circle made a distribution of property to Marchelletta, Jr. in April of 2000, for example, the classification cannot take place until the end of Circle's fiscal year which was March 31, 2001. In this case, the added twist is the overlapping nature of Circle's and Marchelletta, Jr.'s tax years. Because it is impossible to determine – as a matter of objective tax law – the proper classification of any distribution until Circle's fiscal year ends, the effective date of such classification cannot occur before the last day of the corporation's fiscal year.

3. All Home Construction Expenses Incurred On or After April 1, 2000 Could Not Have Been Realized Until March 31, 2001 – the Date Constituting the End of Circle's Fiscal Year.

Virtually every single expense paid by Circle with respect to Marchelletta, Jr.'s home construction was paid out after April 1, 2000, and in many instances, were made after Circle's March 31, 2001 fiscal year ended. For any distribution made from April 2000 through March 2001, Circle recorded the payments, but could not properly classify them for tax purposes until the close of its fiscal year: March 31, 2001. At the time Marchelletta, Jr.'s tax year closed on December 31, 2000, these payments could *not*, as a matter of law, have been objectively classified for tax purposes. Therefore, none of these distributions could have contributed to a material misstatement necessary for each of the conviction counts.

4. The Sole Home Construction Expense Paid Out Before April 1, 2000 Does Not Constitute a Material Misstatement, and Cannot Be a Reasonable Inference of the Jury's Verdict.

The only expense Circle paid on behalf of Marchelletta, Jr. before April 1, 2000 was the deposit due the general contractor within five days of commencing construction. (Gov.'s Exhibit 114.) Construction had begun in January of 2000. (Vol. 18, Doc. 206, p. 15-16.) It was not until April of 2000 that any other costs were paid out on behalf of Marchelletta, Jr. (Vol. 18, Doc. 206, p. 278:19-21.) The January payment constituted a *de minimus* $36,456 out of the millions of dollars of home construction expenses presented to the jury. (Vol. 18, Doc. 206, p. 277:6.) After the jury convicted Marchelletta, Jr. of failing to include those substantial home construction expenses related to calendar-year-2000 on his personal return as income, it would be unreasonable to conclude that the jury would have convicted him for omitting a mere $36,456. This is especially true, given the jury's acquittal of count involving 1999 where amounts much greater than $36,000 were at stake.

As to Marchelletta, Jr.'s three conviction counts, objective tax law, as reinforced by *Boulware*, demands that any distributions occurring during Circle's March 31, 2001 fiscal year be recognized at the end of Circle's fiscal year and that they be properly classified. 26 U.S.C. § 316(a); *Boulware*, 128 S.Ct. at 1182 ("Sections §§ 301 and 316(a) govern the tax consequences of constructive

distributions made by a corporation to a shareholder with respect to its stock.")
Any transactions occurring after March 31, 2001 for Circle and after December 31, 2000 for Marchelletta, Jr. personally are wholly irrelevant to Marchelletta, Jr.'s convictions as a matter of law when determining whether a material misstatement was made on their respective returns using the required objective methodology. The vast majority of questionable distributions occurred on or after April 1, 2000 and any remaining transactions occurring before that date are *de minimis*. Indeed, the jury acquitted Marchelletta, Jr. of all conduct occurring before January 1, 2000. Consequently, Marchelletta, Jr.'s convictions should be reversed and remanded with instructions to dismiss.

CONCLUSION

Under any fair analysis, Jerry Marchelletta, Jr.'s convictions should be dismissed, or in the alternative, the case reversed and remanded for a new trial that comports with basic principles of fairness and integrity.

Dated at Milwaukee, Wisconsin, on this the 10th day of November, 2008.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7)(B) because this brief contains 13,984 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportional spaced typeface in Times New Roman font, 14-point for text and footnotes.

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Dated: November 10, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the parties, by sending a copy to their respective attorneys of record, by Federal Express next-day delivery pre-paid, to the following addresses:

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ADDENDUM