APPEAL NO.: 08-13740-C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

THERESA KOTTWITZ,
GERARD MARCHELLETTA, SR., and
GERARD MARCHELLETTA, JR.,

Defendants-Appellants.

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 REPLY BRIEF

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STATEMENT REGARDING
ADOPTION OF BRIEFS OF OTHER PARTIES

Gerard Marchelletta, Jr. hereby adopts by reference the portions of the Gerard Marchelletta, Sr.'s Reply Brief regarding the jury instruction issue and the sufficiency of the evidence issue. The jury instruction section begins on page 1 of Gerard Marchelletta, Sr.'s Reply Brief and ends on page 22. The sufficiency of the evidence issue begins on page 22 of Gerard Marchelletta, Sr.'s Reply Brief and ends on page 29. Finally, Gerard Marchelletta, Jr. also adopts Gerard Marchelletta, Sr.'s objection to the facts as set forth in Gerard Marchelletta, Sr.'s Reply Brief at pages 1 through 4.

ARGUMENT AND CITATIONS OF AUTHORITY

I. MARCHELLETTA, JR. ADEQUATELY PRESERVED THE RELIANCE JURY INSTRUCTION ISSUE FOR APPEAL UNDER AN ABUSE OF DISCRETION REVIEW STANDARD, AND THE DISTRICT COURT INDEED ABUSED ITS DISCRETION BY IMPERMISSIBLY WEIGHING THE PREDICATE EVIDENCE AND USURPING THE JURY'S ROLE.

Not only did Marchelletta, Jr. properly preserve this objection, entitling him to an abuse of discretion standard of review, but the district court improperly weighed the evidence when considering whether to give the reliance on accountant instruction and created its own rule by misinterpreting the legal precedent cited in its reasoning. In its Appellee's Brief, the prosecution failed to overcome the wealth of case authority in Marchelletta, Jr.'s favor, most significantly by ignoring the three strongest controlling precedents in this Circuit governing theory of defense jury instructions: *United States v. Strauss*, 376 F.2d 416 (5th Cir. 1967), *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968), and *United States v. Eisenstein*, 731 F.2d 1540 (11th Cir. 1984). All of these cases were predominantly featured in Marchelletta, Jr.'s Opening Brief, and all require reversal.

A. Marchelletta, Jr. Requested a Theory of Defense Reliance Instruction, the Request Was Considered, Denied, Objected to, and Ultimately Erroneously Omitted, and Hence, the Issue Was Preserved on Appeal Under an Abuse of Discretion Review Standard.

At the very outset, the prosecution misstates the record regarding the jury instruction charging conference in its "Statement of the Issues," by declaiming

there was no "specific objection" to the court's refusal to propound the reliance on accountant jury instruction. Quite to the contrary, the defense specifically requested, and the district refused to grant, over the defense's objection, that instruction. The prosecution apparently believes, without any citation to authority, that defense trial counsel must argue with the judge *ad nauseum* over a trial court's refusal to propound a requested defense jury instruction. That is not the law. The defense requested the reliance on accountant instruction and the court refused to give it. The defense objected.

Moreover, the prosecution fails to address a critical colloquy between the district court and defense counsel over preserving defense objections to jury instructions not given. After closing arguments, but before the jury began deliberations, defense counsel advised the court that he had "prepared in writing an objection to the Court's charge, and it's basically just a recitation of what we requested the Court didn't charge . . . . If I can either read that now or I could just file it," to which the court responded: "Just file it." (Vol. 29, Doc. 213, pp. 1343:25-1344:7.) After instructing the jury to go to lunch and to not commence deliberations until 2:15 p.m. that afternoon, the district court directed the defense to make a filing in order to preserve those objections for the defense. (Vol. 29, Doc. 213, p. 1340:6-20.) Prior to the jury's deliberations, and contrary to the prosecution's contention, the defense filed specific, written, and *timely* objections

to jury instructions, prior to jury deliberations, including the trial court's failure to give the defense's requested reliance instruction:

> Finally, the Court refused to give the Defendant's proposed Jury Instruction Number 15, concerning "Good Faith Reliance Upon . . . Accountant Failure of Accountant to Exercise Due Care." The Defendants contend that the district court should have granted this instruction. *See* D.E. 81.

(Vol. 2, Doc. 95.)

One has to wonder, on this record and in the prosecution's view, precisely how trial attorneys could preserve *any* objections to jury instructions. How many times must a trial attorney object? Specific, written, and timely objections, made at the district court's direction, are insufficient? The prosecution's tortuous attempt to assert that the defense's objection to the court's refusal to instruct the jury on the core theory of defense, reliance on accountant, was insufficient, fails. The proper standard of review is for abuse of discretion.

B. The District Court Impermissibly Weighed the Evidence When Considering Whether a Reliance on Accountant Instruction Was Appropriate.

The prosecution got one thing right, however: "The preservation rule is not technical. It promotes judicial economy by providing the district court 'the chance to correct errors before the case goes to the jury.'" (Gov. Br., p. 27, quoting *United States v. Sirang*, 70 F.3d 588, 594 (11th Cir. 1995)). In other words, the preservation rule is designed to prevent trial attorneys from "sandbagging" district

courts and preventing a sufficient vetting of a particular objection to create appeal issues that might have been otherwise resolved.

Here, it was abundantly clear to the district court (and everyone else who was paying attention) why the defense requested the reliance instruction; the court cited to *United States v. Johnson*, 730 F.2d 683 (11th Cir. 1984),[1] discussed various factors and issues, and then declined to give the instruction. As amply demonstrated in Marchelletta, Jr.'s Opening Brief, the court applied an incorrect sufficiency of the evidence standard – an impermissible "factfinder" standard disapproved in this Circuit for decades – and the prosecution's Appellee's brief wholly fails to address this fundamentally important issue, instead focusing on its unavailing "waiver" argument in an abortive attempt to avoid the abuse of discretion jury instruction review standard.

Moving forward with this judicially disapproved "weigh the evidence" approach, the prosecution actually makes an excellent argument that the trial evidence of reliance was subject to competing jury inferences. First, in a puzzling section beginning at page 29 of the Appellee's Brief, the prosecution urges that "[t]here was *no evidence of accountant advice*." (Gov. Br., p. 29, emphasis added.) This argument misses the mark completely, and betrays a complete lack of

[1] As set forth in Marchelletta Jr.'s Opening Brief, the district court also misapprehended *Johnson* by misinterpreting the word "showing" to require an evidentiary showing rather than merely a showing of logical relevance to the defense, as *Johnson* described. *See* Marchelletta, Jr.'s Opening Br., pp. 41-42.

understanding of what accountants are doing when they audit books and records and prepare tax returns. The preparation of necessary tax returns *is the advice*. CPA Schwartz was advising his clients, the Marchellettas, that based upon the audited financial statements he prepared for Circle, the correct corporate and personal tax treatment was declared and codified on the tax returns he prepared.

For it is beyond cavil that by preparing tax returns, the CPA tells his client many things, all the product of expert tax advice, including, but of course not limited to: (1) this particular revenue receipt is taxable income under the IRC; (2) these particular expenditures constitute deductible cost of goods sold under the IRC; and (3) this equipment purchased is amenable to amortization over several years as a deduction against taxable income under the IRC. And the examples of the CPA's expert tax advice go on and on to include every line item entry and calculation on the tax return, *including the treatment of distributions to shareholders of a closely held corporation*, the only tax return declaration that could constitute an offense under any of the conviction counts as to Marchelletta, Jr.

The prosecution titles its subsection "b": "There Was No Full Good Faith Disclosure," again highlighting the impermissible "weigh the evidence" approach to jury instructions. (Gov. Br., p. 31.) As the prosecution itself declares: "Here, the record does not support – and indeed contradicts – that the Defendants fully

informed Schwartz of all material facts." *Id.*, p. 32. This admission against interest is telling. The question whether the record supported or contradicted the Marchellettas' claim of full disclosure was a question for the jury, upon proper instruction, not the trial court or the prosecution. As set forth in Marchelletta, Jr.'s Opening Brief, the government did indeed present evidence that challenged the Defendants' claim of full disclosure, and that's precisely the salient point: the jury could have drawn competing inferences from the testimony and evidence adduced at trial, which means, inescapably, that sufficient predicate evidence of full disclosure demanded the instruction be given.

C. Even the Prosecution's Appellee's Brief Articulates the Competing Inferences Available From the Evidence.

The prosecution also makes a constellation of curious arguments that again support Marchelletta, Jr.'s claim that full disclosure was a jury question – a question the jurors could not have considered because they were not instructed on the specialized defense of reliance on accounting advice. In discussing the disclosure letter Marchelletta, Jr. gave to CPA Schwartz, the prosecution concludes that "Junior's management letter further misled Schwartz . . . . [a]ll of these representations [regarding his statements of full disclosure] were false." *Id.*, p. 33. Although the Appellants vigorously disagree with the prosecution's conclusion in this regard, that is not the issue on appeal.

Moving on to further weigh the evidence of full disclosure, the prosecution states that the Marchellettas "dumped of [sic] ***all of the company's ledgers*** on [CPA Schwartz] during his annual two-day visit to Circle . . ." *Id*. (emphasis added). That is correct: the trial evidence showed that the Marchellettas provided CPA Schwartz with all of Circle's books and records – including the business ledgers that set forth the home construction projects with special job numbers that did not observe the sequence and form of Circle's actual construction projects, and were actually identified by the residential subdivision names where the homes were built. One can certainly imagine a properly instructed jury determining that providing *all the company's books, records, and ledgers* constituted full disclosure to the CPA, and that the CPA's job is to properly classify distributions to shareholders under the IRC in his return preparation.

Apparently in an effort to get around this significant problem, the prosecution cites to *United States v. Lisowski*, 504 F.2d 1268 (7th Cir. 1974) for the proposition that failing to provide books and records setting forth all relevant financial transactions vitiates the idea of full disclosure. And that is certainly true, but inapplicable here, by the prosecution's own admission that the Marchellettas *did provide all relevant books, records, and ledgers* to CPA Schwartz. In *Lisowski*, the defendant did not include "clandestine" cash transactions in the records provided to his return preparer. *Id*. at 1272. It is, of course, obvious that

keeping a second set of books not provided to the return preparer or providing books that do not include any reference to substantial cash receipts does not constitute full disclosure. Such conduct is baseline conventional tax evasion, something absolutely not present in this case. Nor can it be said that the Marchellettas took "positive action" to mislead CPA Schwartz, as was the case in *Lisowski*. *Id*.

Moreover, the trial record is replete with evidence of full disclosure and reliance on CPA Schwartz. In addition to the disclosure letter Marchelletta, Jr. supplied to CPA Schwartz, Schwartz's own testimony directly contradicts many of the prosecution's arguments on appeal. Although Marchelletta, Jr.'s Opening Brief sets forth comprehensive citations to evidence of full disclosure and reliance, several critical and amplified examples are also set forth here.

Regarding the prosecution's suggestion that CPAs must directly interact with owners of corporations, Schwartz testified that "[he] wouldn't necessarily go up to the owner [for information]." (Vol. 22, Doc. 99, p. 32:6-7.) Lack of interaction between corporate officers and return preparers is no indication of any lack of disclosure, but at all events, this was for the jury to decide.

CPA Schwartz also testified that all general business ledgers are subject to CPA corrections and end-of-year adjusting entries, evidence that a properly charged jury would have considered when deliberating on whether the

Marchellettas' provision of all Circle's books, records, and ledgers constituted the full disclosure aspect of the reliance defense. (Vol. 22, Doc. 99, p. 32:16-19.)

CPA Schwartz had "as much time as [he] needed" to provide audited financial statements and final tax returns, (Vol. 22, Doc. 99, p. 47:18-21), and neither the Marchellettas nor anyone else at Circle ever attempted to limit his analysis, (Vol. 22, Doc. 99, p. 60:13-14).

Co-defendant Kottwitz, Circle's bookkeeper, solicited CPA Schwartz's expert opinion about classifying officer loans in relation to her bookkeeping duties. (Vol. 22, Doc. 99, p. 98:10-15.)

CPA Schwartz testified that he had access to any reports he wanted, (Vol. 22, Doc. 99, p. 146:2-5); that Kottwitz gave him any documents he requested, (Vol. 22, Doc. 99, p. 161:9-25); that he could ask questions of anyone, including Marchelletta, Jr., (Vol. 22, Doc. 99, pp. 173:25-175:3); that not only was he charged with preparing final tax returns, but with preparing certified, audited financials for Circle, (Vol. 22, Doc. 99, p. 125:4-7); that Circle and the Marchellettas were relying upon him to audit the financials and prepare proper tax returns, (Vol. 22, Doc. 99, p. 185:3-5); and that Marchelletta, Sr. was not "a book man" and was not competent to "discuss anything to do with the technicalities of the books and records," (Vol. 22, Doc. 99, pp. 173:25-175:3; Vol. 22, Doc. 99, p. 187:3-13).

These highlighted portions constitute only a brief survey of the substantial and wide-ranging evidence of the Marchellettas' full disclosure and specific reliance on CPA Schwartz for all matters regarding both Circle's audited financials and final corporate and personal tax returns. And yet against this voluminous and specific evidentiary backdrop, the prosecution variously urges on appeal that either there was "no evidence of accountant advice" or that "there was no good faith disclosure." The former assertion is simply untrue, while the latter is merely the prosecution's inferential conclusion that was within the jury's exclusive province to make upon proper reliance on accountant instruction from the trial court.

On this record, in a complex tax and conspiracy case, with the jury awash in reams of tax/financial documents and days of technical tax computation testimony, it was a clear abuse of discretion not to give the reliance on accountant instruction. Contrary to the prosecution's assertion, based upon its quotation of *Blair* (a Third Circuit case), there was absolutely nothing frivolous, idly speculative, far fetched, irrelevant, or diverting about the requested reliance on accountant instruction. Instead, and correctly so, the reliance charge would have "direct[ed] and focus[ed] the jury's attention on the evidence given at trial," precisely what was required to provide the jury necessary guidance in this complex area of tax law. *United States v. Blair*, 456 F.2d 415, 420 (3rd Cir. 1972).

D. The General Intent and Willfulness Instructions Are Insufficient to Cure the Omission of a "Reliance on Accountant" Theory of Defense.

After perusing the prosecution's argument that the general intent and willfulness instructions vitiated the need for any reliance on accountant instruction, one is left wondering why Special Instruction No. 18, the good faith reliance instruction, was approved by this Circuit's Committee on Pattern Jury Instructions. But thoughtful observers do not wonder for long. One of the most difficult concepts for laypersons to grasp is the idea of "good faith" constituting a defense to a criminal charge. Even more tenuously understood is the idea that one might rely in good faith on the advice of counsel or a CPA as a complete defense to certain criminal charges. What does good faith reliance on a CPA mean? How shall a jury sort and sift through the evidence to determine whether the defendant "relied" on the CPA, much less did so in "good faith?" The jury needs guidance from the trial court prior to closing argument and deliberation – as this jury did and was deprived of – and it can only receive that necessary guidance from the specialized reliance instruction that provides deliberative guideposts for this specialized theory of defense.

Furthermore, several of the prosecution's cases cited to support the proposition that a reliance on an expert instruction is unnecessary when a district court instructs on willfulness or good faith are distinguishable or inapposite. First,

as to *United States v. Tannehill*, 49 F.3d 1049 (5th Cir. 1995), the instruction was denied because the *Tannehill* defendant had sought the attorney's advice regarding a real estate contract, and not the supporting appraisal; and it was the misstated appraisal that was the affirmative act supporting the conspiracy conviction, not the advice of counsel regarding the sales contract. *Id.* at 1057-58. Unlike the Marchellettas, the *Tannehill* defendant did not seek advice regarding the alleged misstatement.

Second, in *United States v. Kouba*, 82 F.2d 768, 771 (8th Cir. 1987), the requested "theory of defense" instruction merely described a particular IRC code section governing gift taxes. Because the conviction involved an income tax-related crime, the defense was a mere misunderstanding of the law. Consequently, the good faith instruction completely covered the theory of defense – a good faith mistake of law.

Third, in *United States v. Martinelli*, 454 F.2d 1300, 1315-16 (11th Cir. 2006), the district court denied a good faith instruction in a mail fraud case. The case was upheld because the *mens rea* definition of knowingly given by the court required the jury to exclude the possibility of good faith. This is far different than explaining the subtle nuances attendant to a reliance on expert instruction.

Fourth, it is worth noting that the prosecution fails to address three of the primary cases Marchelletta, Jr. relied upon in his Opening Brief, all of which are

binding authority in this jurisdiction. Those cases are *United States v. Strauss*, 376 F.2d 416 (5th Cir. 1967), *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968), and *United States v. Eisenstein*, 731 F.2d 1540 (11th Cir. 1984). Given the strong language present in these cases regarding a defendant's right to an instruction on the theory of defense, Marchelletta, Jr. is clearly entitled to have his convictions reversed.[2]

The prosecution's final argument regarding the reliance jury instruction – namely, that the second half of the instruction related to an accountant's duty of exercising "due care" – is a red herring. The sole focus of the court's decision was strictly the reliance aspect of the requested instruction, not any consideration of clarifying a CPA's duty of care to a client. At base, and of sole importance here, was the district court's impermissible evidence weighing approach to the reliance instruction. Moreover, the duty of care appendage was a correct statement of the law, was not covered by any other jury instruction, and, at all events, was easily severed from the requested instruction if the district court had any concerns.

Therefore, based on all of the foregoing, the proper standard of review is abuse of discretion, and the district court abused its discretion in denying the theory of defense reliance jury instruction. And the defense was substantially

[2] The prosecution also failed to address any of the fifteen controlling Fifth Circuit and Eleventh Circuit cases on this identical issue set forth in footnote six of Marchelletta, Jr.'s Opening Brief. (Marchelletta, Jr.'s Opening Brief, pp. 49-50, n.6.)

prejudiced by this critical jury instruction omission. As the prosecution is wont to point out in several sections of its Appellee's Brief, the jury was cautioned through the district court's instructions not to consider counsel's argument as evidence. Marchelletta, Jr. was deprived of his right to take his core theory of defense to the jury in closing argument, with more than the mere argument of counsel that the jury was instructed to disregard.

II. THE PROSECUTION UNDULY CABINED BOULWARE'S EFFECT, IMPROPERLY ASSUMED THAT THE TRANSACTIONS AT ISSUE WERE UNQUALIFIED DISTRIBUTIONS, AND MISSTATED MARCHELLETTA, JR.'S POSITION REGARDING CONTEMPORANEOUS CRIMINAL INTENT.

The prosecution's opposition to Marchelletta, Jr.'s *Boulware* argument fails on several fronts. First, the prosecution failed to address the critical timing issue central to transactions between closely-held corporations and their shareholders. Second, the transactions at issue in this case were not "unqualified distributions" as the prosecution suggests. Third, the prosecution mischaracterized Marchelletta, Jr.'s argument regarding how intent intersects with the objective consideration of the material misstatement element of 26 U.S.C. §§ 7206(1) and 7206(2), by incorrectly suggesting that Marchelletta, Jr. believes contemporaneous criminal intent is always irrelevant. Consequently, Marchelletta, Jr.'s Rule 29 motion should have been granted, and this cause should be reversed on appeal and dismissed with prejudice as to all conviction counts.

A. *Boulware*'s Requirement That the Material Misstatement Element of Crimes Under 26 U.S.C. §§ 7206(1) and 7206(2) be Determined Objectively Severed that Element's Link to *Mens Rea* that Previously Existed in the Eleventh Circuit Under *United States v. Williams*, 875 F.2d 846, 850-52 (11th Cir. 1989).

The prosecution may no longer rest upon a mere showing that funds were diverted from a corporation to avoid a showing of proper tax characterization of a transaction as was previously allowed under *United States v. Williams*, 875 F.2d 846, 850-52 (11th Cir. 1989). In this case, the timing issue – that is, in which tax year should particular transactions be properly recognized – is just as critical as proper characterization of a distribution as a loan, dividend, wage, or return of capital. The prosecution suggests that Circle's shareholders *must always* recognize any corporate payments as dividends when paid – an argument that ignores the economic realities of closely-held corporations with more than one owner and basic principles of tax law. On this appeal, whether there is even a *possibility* the defendants were illegally convicted is extremely important. At the time this case was tried, the prosecution, the defense, and the district court were all without the benefit of *Boulware* and its clarifications regarding distribution and reporting timing requirements. So what are appellate courts to do when the Supreme Court, during the pendency of the appeal, issues a decision raising the possibility of an illegal conviction? Reverse and, if necessary, remand.

The trial in this case is similar to that found in *United States v. High*, 117 F.3d 464, 470 (11th Cir. 1997). In *High*, the district court applied an improper legal standard to a question of law – an error not discovered until the Supreme Court issued a controlling decision contrary to the district court's determination. *Id*. At the time of the *High* trial, the district court's decision correctly applied the then-controlling Eleventh Circuit case law. Prior to the appeal's disposition, however, the Supreme Court overruled that Eleventh Circuit precedent.

In *High*, the jury was instructed regarding the *mens rea* element of a structuring conviction. "The district court instructed the jury regarding the structuring currency transactions offense . . . in accordance with our holding in *United States v. Brown*, 954 F.2d 1563 (11th Cir. 1992)." *High*, 117 F.3d at 469. Subsequent to the trial, but prior to the disposition of the appeal, the Supreme Court decided *Ratzlaf v. United States*, 510 U.S. 135 (1994) and even "[t]he government concede[d] that [the trial court's *Brown*] instruction was improper." *High*, 117 F.2d at 469. Here, *Boulware* was issued after the trial, but prior to the disposition of appeal, and *Boulware* supports the conclusion that Marchelletta, Jr.'s Rule 29 motion was improperly denied.

Marchelletta, Jr. challenged the timing issue in his Rule 29 motion when he argued: "[M]any, if not all of the government's specific items of alleged omitted income were *not required* to be reported as income for [the] year in question."

(Vol. 2, Doc. 127, p. 9) (emphasis in original). The district court's order did not address how the trial evidence supported a finding that the material misstatement element of 26 U.S.C. §§ 7206(1) and 7206(2) was met, as Marchelletta, Jr. specifically challenged. (Vol. 2, Doc. 134.) Perhaps the district court felt the "materially false" element in § 7206 crimes was inextricably linked to intent or that the dividend recognition rules did not apply. This reasonable assumption is based on controlling Eleventh Circuit case law in effect at the time of trial – case law specifically identified and disdained by *Boulware v. United States*, 127 S.Ct. 1168, 1175, n.6 (2008).

In its discussion regarding the Circuit split, the High Court in *Boulware* pointed to the Eleventh Circuit as one of several Circuits that had incorrectly held that dividend recognition rules did not apply in criminal tax cases. *Id.* (citing *United States v. Williams*, 875 F.2d 846, 850-52 (11th Cir. 1989)). Specifically, the Eleventh Circuit, along with the Third and the Sixth Circuits, had "taken the position that §§ 301 and 316(a) are altogether inapplicable to criminal tax cases involving informal distributions." *Boulware v. United States*, 128 S.Ct. 1168, 1175, n.6 (2008). Because the district court did not address Marchelletta, Jr.'s

challenge to the material misstatement, one can only presume that *Williams* controlled the judge's disposition of the timing issue.[3]

Based on *Williams*, the Eleventh Circuit's rule at the time of trial did not require the prosecution to show the proper characterization of the transaction if the prosecutor showed that funds were diverted from a corporation. "We adopt the *Davis* rule and hold that the government need not characterize diverted income in criminal tax cases." *Williams*, 875 F.2d at 851-52. *Boulware*, however, categorically rejected that approach, and by doing so, calls *Williams* into question: "Sections 301 and 316(a) govern the tax consequences of constructive distributions made by a corporation to a shareholder with respect to its stock." *Boulware*, 128 S.Ct. at 1182. Therefore, this situation is similar to the one found in *High*. A Supreme Court decision has been issued post-trial, but before disposition of this appeal, and that controlling precedent highlights a significant legal error in the law governing the district court's Rule 29 analysis.

B. The Prosecution's Other Objections to the Application of *Boulware* Lack Merit.

The prosecution makes several other unavailing arguments in opposition to *Boulware*. First, the prosecution assumes that each transaction at issue in this case constituted an unqualified distribution, but ignores the fact that the corporation

[3] The *Williams* precedent also affected the Defendants' framing of the issue in the Rule 29 as primarily intent-related, when in fact, they were also challenging the "material misstatement" element – an argument *Williams* technically foreclosed.

may have an interest in balancing dividend payments in relation to each shareholder's interest. (Gov't Br., p. 53.) If a qualification attached to the transaction, then all the cash dividend and in kind dividend cases cited by the prosecution that deal with recognition timing of dividends would be inapposite. (Gov't Br., p. 53). The fact is that Circle *does* have an interest in distributing dividends in a manner consistent with the owners' respective ratio of shares, and had CPA Schwartz done his job, he would likely have considered this in advising the Marchellettas and Circle on how to characterize these transactions for tax purposes. In any case, as a matter of law, Schwartz could not have made that determination until the end of the tax year as fully argued in Marchelletta, Jr.'s Opening Brief.

Second, the prosecution's attempt to frame Marchelletta, Jr.'s argument, "that, at least for purposes of Counts Three through Five, their contemporaneous criminal intent was irrelevant" is erroneous. (Gov't Br., p. 52.) As *Boulware* clearly held, even if intent is irrelevant to the determination of a tax deficiency or a material misstatement on a tax return, the prosecution must still prove willfulness. *Boulware*, 128 S.Ct. at 1177. Marchelletta, Jr. does not argue that contemporaneous criminal intent is *completely* irrelevant; rather, he argues that contemporaneous criminal intent is irrelevant when considering the material misstatement element of §§ 7206(1) and (2). *Id*. The prosecution would have this

Court continue down the *Williams* path and adopt a rule *Boulware* rejected as lacking "economic realism," *Boulware*, 127 S.Ct. at 1177; namely, that the contemporaneous intent related to a particular transaction would dispositively control the characterization of that transaction for tax purposes, notwithstanding an objective determination to the contrary. "There was no evidence that the Marchellettas at the time considered, relied on, or were advised as to the implications of Circle's fiscal year." (Gov.'s Br., p. 51.) The prosecution's argument was wholly rejected by the High Court's recent teaching: "[T]hat a criminal defendant may not treat a distribution as a return of capital without evidence of a corresponding contemporaneous intent sits uncomfortably not only with the tax law's economic realism, but with the particular wording of §§ 301 and 316(a), as well." *Boulware*, 128 S.Ct. at 1177. In other words, characterizing a transaction, including the proper recognition timing, is *not* dependent on the defendant's contemporaneous intent at the time the transaction was made. Given the Supreme Court's clear position on this point, the prosecution's invitation to continue to require contemporaneous intent when considering the economic realities of an alleged material misstatement should be rejected as directly contrary to controlling Supreme Court precedent.

III. PROSECUTORIAL MISCONDUCT IN OPENING STATEMENT TAINTED THE ENTIRE TRIAL AND CONSTITUTED PLAIN AND REVERSIBLE ERROR.

The prosecution first attempts to justify the impermissibly argumentative and highly improper opening statement by characterizing the Appellants' complaints as "isolated statements." (Gov. Br., pp. 61-62.) A fair reading of the opening statement transcript quickly reveals that the improper statements were not isolated. In addition to the bookend invocations of the jurors' pecuniary interest as taxpayer-victims of Marchelletta, Jr.'s alleged crimes, the opening statement was littered with improper argument and false factual assertions. The prosecutor impermissibly argued twice to the jury that the Marchellettas had "cooked the books"; argued seven times that the Marchellettas had used "accounting tricks"; argued three times that the Marchellettas had variously "dummied" or were "dummying up" the books; argued three times that the Marchellettas "didn't want to follow the rules everyone else has to" or variants thereof; argued twice about the alleged criminal acts as "making you richer"; and argued six times to the jury that the Marchellettas' built "mansions" with the fruits of their then-alleged tax fraud.[4]

[4] At the sentencing hearing, the district court was properly cautious and thoughtful when he observed that: "[T]he Marchellettas . . . walked away from these transactions owning an upscale house, each of them, in excess of a million dollars. Not necessarily a mansion, but certainly a nice house." (Vol. 30, Doc. 204, p. 145:13-16.)

In addition, the prosecutor falsely argued to the jury that the Marchellettas "saw the sirens in the rear view mirror" – *four times* the prosecutor argued this factual falsehood to the jury in opening statement to conjure up for the jury the false image of the Marchellettas as street criminals running from the law. The prosecutor also falsely told the jury that it wasn't CPA Schwartz's "job to look for fraud." To the contrary, all CPAs have an axiomatic ethical (and sometimes legal) responsibility to detect fraud and bring any questions or concerns to their client; in some circumstances, CPAs have a duty to report fraud to the proper authorities.

Arguing about what CPA Schwartz's duties were, the entire quote is a stark example of improper opening statement argument: "He spent a couple of days a year doing basic auditing. He wasn't looking for – you know, it wasn't his job to look for fraud, to look for people lying, cheating and stealing. Just making sure the numbers add up." (Vol. 17, Doc. 205, p. 24:8-11.) These statements about CPA Schwartz's duties are completely false, and went directly to the Marchellettas' core theory of defense. First, from CPA Schwartz's own testimony, he "was engaged by Circle to prepare their *audited financial statements* and the related tax returns." (Vol. 22, Doc. 99, p. 39:3-5) (emphasis added). Audited financial statements must be certified by the CPA who prepares them. (Vol. 22, Doc. 99, p. 125:4-7.)

The uncontroverted trial testimony showed that CPA Schwartz was no simple bookkeeper; instead, he was preparing audited financial statements for

Circle that required his certification that he had reviewed all relevant source documents, and that all revenues, expenses, assets, and liabilities were properly characterized and reported. The prosecutor's false statements to the contrary substantially prejudiced Marchelletta Jr.'s core reliance theory of defense at the outset of the case. And, of course, Marchelletta Jr. was not charged with lying or stealing, and the trial record is wholly bereft of any evidence that he lied to or stole from anyone.[5]

The second attempt at explanation is particularly strange:

> The reference to these crimes as against the "U.S. and its taxpayers" was part of the explanation of what this tax evasion case was about. Indeed, the Indictment charged that the purpose of the crime was to "defraud the U.S." with regard to "the ascertainment, computation, assessment, and collection of . . . income taxes."

(Gov. Br., p. 62.)

Even in the argument's own terms this statement is false, because a *Klein* conspiracy's elements contain no reference whatsoever to defrauded "taxpayers," nor do any of the hundreds of federal cases dealing with such tax conspiracies. American taxpayers have no criminal or civil cause of action against someone who commits tax fraud, because they are not, as a legal matter, the objects or victims of tax fraud.

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[5] Giving the prosecutor the benefit of the doubt, the implied accusation of "cheating" was probably in play, given the colloquial expression "cheating on your taxes," but still inappropriately argumentative in opening statement.

Next, the prosecution attempts to avoid the universal precedent that invoking the jurors' pecuniary interest as taxpayer-victims of Marchelletta, Jr.'s alleged crimes constituted highly improper misconduct by floating the red herring that the invocation wasn't of a "personal nature." (Gov. Br., p. 64.) *Of course* the invocation was personal to the jurors, but again, the prosecution seems to forget that this was a tax case. Each and every one of the jurors was a taxpayer, and Marchelletta, Jr. was accused of tax crimes. A criminal tax case is unlike any other in this respect, where the jurors' status as taxpayers is directly linked, without any division or separation, from the crimes alleged. It was not necessary, as it was in the cases cited by both the prosecution and the Appellants, for the jurors to be put in a frame of mind of potential victims of the defendants' alleged crimes, or as a potential tort victim by happenstance or fortuity, in which cases it is rhetorically necessary to "personalize" the suggestion to create the necessary transference. The prosecutor's direct statement to the jury that taxpayers were the victims of Marchelletta, Jr.'s crimes falls squarely within the web of universal condemnation.

Against all of this, the prosecution simply declaims: "There was no impropriety, and certainly nothing constituting plain error requiring reversal." (Gov. Br., pp. 60-61.) The rest of the argument centers on whether the conviction counts were close calls, and whether boilerplate preliminary jury instructions regarding what the jury can properly consider as evidence cured any prejudice

caused by the improper opening statement argument. Frankly, the case law is not that illuminating here, because this is an exceptional case that must be judged on its peculiar facts. On balance, we respectfully submit, the conviction counts were very close calls indeed, and it should never be assumed that the opening statement misconduct "genie" can be put back in the bottle by preliminary jury instructions regarding what can, and cannot be, considered as evidence. Juries are sponges that soak up everything, but particularly the scandalous and titillating, and as the Supreme Court has opined, in a case cited in Marchelletta, Jr.'s Opening Brief but ignored by the prosecution:

> 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).

Here, no curative instructions were given, and the prosecution's factually false, misleading, and inflammatory arguments were left to soak in with the jury throughout the prosecution's case-in-chief and the entire trial. This constituted plain and reversible error, as fully explicated in Marchelletta, Jr.'s Opening Brief.

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 21st day of January, 2009.

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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 6,039 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: January 21, 2009

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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