UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN W. POND, Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Appellee.	Case No. 06-9002

APPELLANT'S PETITION FOR REHEARING AND FOR REHEARING EN BANC

Steven W. Pond moves the panel for rehearing regarding its decision entered January 4, 2007 pursuant to Federal Rules of Appellate Procedure Rule 40. In the event the Panel chooses to vote not to rehear the errors addressed by Appellant herein then Appellant requests the Clerk to Circulate this Petition for Rehearing En Banc pursuant to Federal Rules of Appellate Procedure Rule 35 to all active Justices of the United States Court of Appeals for the 10th Circuit.

QUESTIONS PRESENTED

1. WHETHER THE BURDEN OF PROOF WITH RESPECT TO IMPOSITION OF ANY PENALTIES OR OTHER ADDITIONS TO TAX REMAINS AT ALL TIMES WITH THE COMMISSIONER OF THE INTERNAL REVENUE PURSUANT TO 26 U.S.C. § 7491(c)?

2. IF "NO SUPPORT IN THE RECORD" IS RELIED UPON TO "DENY HIS CLAIM" REGARDING FORM 1040 THEN HOW CAN THE TAX COURT AND THIS COURT AFFIRM THE CLAIMS OF PENALTIES AND ADDITIONS TO TAX MADE BY THE COMMISSIONER IN REGARD TO THE SAME ABSENT FORM 1040s?

3. DOES THE HOLDING IN *UNITED STATES V. COLLINS*, 920 F.2d 619, 630 N.12 (10th CIR. 1990), *UNITED STATES V. DAWES*, 951 F.2d 1189, 1191-92 (10th CIR. 1991) AS WELL AS THE SUPREME COURT 'S DECISION IN *DOLE V. UNITED*

STEELWORKERS OF AMERICA, 494 U.S. 26, 33 (1990) TAKEN TOGETHER WITH THE PAPERWORK REDUCTION ACT OF 1995 AND THIS ACT'S LEGISLATIVE HISTORY, MAKE "UNEQUIVOCALLY CLEAR" THAT FORMS LIKE THE FORM 1040 ARE NOT ONLY AN "INFORMATION COLLECTION REQUEST" WITHIN THE MEANING OF THIS ACT BUT ALSO THAT THE INTENT OF CONGRESS WAS TO ELIMINATE ALL EXEMPTIONS PREVIOUSLY CONSTRUED BY ANY COURT DECISION WHATSOEVER?

4. SHOULD THE COURT HAVE REMANDED THIS CASE TO TAX COURT TO MAKE A DETERMINATION REGARDING THE PAPERWORK REDUCTION ACT OF 1995 VIOLATIONS CLAIMED BY APPELLANT?

5. WHETHER LOOKING AT FORM 1040 AND SEEING DISPLAYED NUMBER 1545-0074 SATISFIES TEST THAT NUMBER DISPLAYED MUST BE ASSIGNED IN ACCORDANCE WITH PAPERWORK REDUCTION ACT OF 1995?

6. WHETHER THE EXEMPTION AMOUNT FOR YEARS 1995 THROUGH 2001 RELIED UPON BY SECRETARY IN ITS CLAIMS FOR PENALTY AND ADDITIONS WERE EVER PUBLISHED IN FEDERAL REGISTER OR OTHERWISE EXISTED IN THEORY PRIOR TO THE YEAR THEY APPLIED TO?

ARGUMENT FOR REHEARING AND REHEARING EN BANC

1. Panel decision did not take into consideration that burden of proof or "production" with respect to the claims made by the Secretary in the Notice of Deficiencies which gave rise to Appellant's Petition and his claims therein.

The decision by the panel to hold that Tax Court was wrong to find "Pond's argument frivolous, address neither argument, and threaten him with future sanctions for bringing similarly frivolous arguments in subsequent proceedings" by holding that "[t]he Supreme Court, however, has made clear that tax forms such as the 1040 are information collection requests within the meaning of the Act", erred in its decision to then hold that since "Pond did not include any of the 1040 that he challenges in the record for us to review" "we cannot address his arguments." Order @ 5 This decision is contrary to 26 U.S.C. § 7491(c) which states that "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for

any penalty, additions to tax, or additional amount imposed by this title."

In *Preslar v. CIR*, 167 F.3d 1323, 1333 (10th Cir. 1999), this Circuit held that the "Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3001, 112 Stat. 685, 726-27 (1998) (codified at 26 U.S.C. § 7491), popularly known as the "Taxpayer Bill of Rights," shifts the burden of proof to the Commissioner in certain cases...." This "amendment" clearly applies to the facts of this case.

Although this case did not address the burden of production under section 7491(c), there is no doubt the claims made by the Secretary in the Notice of Deficiencies shift the burden solely upon the Commissioner, "notwithstanding any other provision of law." Appellant knows of no such provision and none were identified in the Panel's decision dated January 4, 2007.

Therefore, Appellant respectfully requests the Panel rehear its decision in regard to placing the burden upon Appellant to enter the Form 1040 for years 1995 through 2001[1] as it was not his burden to prove justification or non justification for the Commissioner's claims of penalties and additions to tax. This burden remained the Commissioner and his attorneys to which clearly they failed in satisfying that burden with any evidence.

2. If, as the Panel decision holds, no "1040" was included "in the record" of the Tax Court, then the Panel decision to uphold the decision of the Tax Court cannot be squared with the absence in the record of any evidence supporting the Secretary's claims.

Appellant challenges the decision by the Panel in denying his claim based upon the determination by the Panel that since "Pond did not include any of the 1040 that he challenges in

[1]Not to mention the Tax Court's veiled threats if Appellant continued to make a record or claim protection under the Paperwork Reduction Act of 1995. See Panel Order @ 4

the record for us to review, so we cannot address his arguments." Order @ 5 If the defense claims cannot be "addressed" because this Court could not find any "1040" in the record, then how can the Tax Court decision be maintained in light of the Commissioner's claims being based upon the same Form 1040 for 1995 through 2001 that this Court concludes are not "in the record." If they are not in the record for the benefit of Appellant then how are they magically in the record only to serve the Commissioner's claims?

Therefore, Appellant respectfully requests the Panel rehear its decision in regard to holding the 1040 cannot be "challenged" since they are not found "in the record" for 1995 through 2001, by applying that same logic to hold that because the burden is on the Secretary pursuant to section 7491(c), and because the Secretary submitted no 1040 in support of its claims in its Notice of Deficiencies for 1995 through 2001, or in the Tax Court, this Court "must deny" the Commissioner's claims.

3. The holding in *United States v. Collins*, 920 F.2d 619, 630 N.12 (10th Cir 1990) *United States v. Dawes*, 951 F.2d 1189, 1191-92 (10th Cir. 1991) as well as the Supreme Court's decision in *Dole v. United Steelworkers of America*, 494 U.S. 26, 33 (1990) taken together with the Paperwork Reduction Act of 1995 and Legislative History thereof, makes "unequivocally clear" that forms like the form 1040 are not only an "information collection request" within the meaning of this Act but also that the intent of Congress was to eliminate all exemptions perceived by any Court for any Federal Agency, whatsoever, including the Internal Revenue Service.

The Panel decision sends a very confusing signal that if left in place will only cause more confusion in the future with regard to the status and meaning of Federal Law with regard to Form 1040. There is no question that this Court in *Collins* stated:

> "In *United States v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was obligatory. ***This***

> ***holding is superseded by the Supreme Court's analysis in Dole v. United Steelworkers,*** ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection requests under the Act. Dole would also appear to call into question the holdings in Snyder v. IRS, 596 F. Supp. 240 (N.D.Ind. 1984) and Cameron v. IRS, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS forms. However, Dole does not contravene our recent holding in Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii)"

Collins, 920 F.2d 619, 630 N.12 (10th Cir 1990*)*

In *U.S. v. Dawes*, 951 F.2d 1189 (10th Cir. 1991) this Court in footnote 2 stated:

> "In response to a question from the court during oral argument, counsel for the government indicated that the government did not have a unified federal position regarding this issue. Given the fact that the issue is one of national scope which affects the tax revenues of the United States, we find this posture regrettable."

This Court went on to hold that when dealing with criminal penalties:

> "We would be inclined to follow the general analysis of Wunder and Hicks and hold that the operation of the PRA in these circumstances did not repeal the criminal sanctions for failing to file an income tax return because the obligation to file is a statutory one. **However, we are not compelled to rest our opinion on the statutory origin theory because we find the analysis of other courts which have considered the issue to be persuasive**."

In *Dawes*, this Court stated things like "The Supreme Court in *Dole* has noted that most items in the statutory definition are "forms for communicating information to the party requesting that information" and that the "'reporting and recordkeeping requirement' category is limited to `only rules requiring information to be sent or made available to a federal agency, [and] not disclosure rules.'" *Dole*, 110 S.Ct. at 935. **We agree** with the court in *Crocker*, 753 F. Supp. 1209, that the instruction booklets are "simply publications designed to assist taxpayers to complete tax forms and more easily comply with an 'information collection request.'" Id. at

1216. The same analysis holds true for the tax regulations. **The 1040 form is the information collection request which arguably must comply with the PRA. It is through the 1040 form that the government obtains all of the tax information it requires; the instructions and the regulations do not request any additional information**. "As long as the 1040 form complies with the Act, nothing more is required." *Dawes*,

Even in this Court's analysis of the 6th and 9th Circuits decision to the contrary they explained that repeal by implication is not favored. In 1995 Congress left no doubt as to what they intended in 1980. While addressing the reasons for the changes between the 1980 and 1995 Paperwork Reduction Acts, Congress said in its Legislative History of the 1995 PRA, the purpose for the 1980 PRA was to clarify it originally was enacted to among other things, "eliminate exemptions" for the "Internal Revenue Service". *House Report, 104-13, [page 8] at 171 (1995*) This Report also directed that the difference between the language of the old section 3512 and the new section 3512 was to maintain the same purpose. The only reason it was modified to add certain terms was to maintain consistency and clarity and to "**unequivocally cover all collections of information**." *House R. [page 54] at 217*

Since 1995, the Commissioner of Internal Revenue has been required to give notice to the Public that "You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number." Although this appears in the instruction booklet for Form 1040, it does not appear upon the form itself. This alone violates the PRA of 1995.

In the House Conference Report involving the 1995 PRA, No. 104-99 [page 36] at 248, the House and Senate agreed that:

> "the Senate bill contains a provision which changes the Act's current "public protection" provision by requiring a collection of information subject to the Act display a notice that a person is not required to respond to the collection of information unless it displays a control number which is valid."

This is supported by the language in section 3506. First, Section 3506(4)(B)(i)(b) states that the Director is to "evaluate" fairly whether proposed collections of information should be approved under this chapter to-:

> "ensure that each information collection-(1) is inventoried, **displays a control number** and, if appropriate, an **expiration date**; (2) **indicate the collection is in accordance with the clearance requirements of section 3507**; and (3) **informs the person** receiving the collection of information of - (I) the **reasons the information is being collected**; (II) **the way such information is to be used**; (III) **an estimate, to the extent practicable, of the burden of the collection**; (IV) **whether the responses** to the collection of information **are voluntary, required to obtain a benefit, or mandatory**; and (V) the fact that an agency may not conduct or sponsor, and **a person is not required to respond to, a collection of information unless it displays a valid control** number

Furthermore, 44 U.S.C. § 3507(g) requires an approved number to expire after three years. Since IRS chooses not to display an expiration date, once the number is displayed for three years it has the appearance of being invalid. In fact, the presumption should always be that Congress intended by making these requirements the presumption to the public is that the form is invalid.

44 U.S.C. § 3507(h)(3) provides no agency shall be authorized to make any changes to approved forms unless they have applied to OMB to make the changes and OMB approves those specific changes. If the Agency does not comply with the PRA of 1995 "The Act "allow[s] the public, by refusing to answer these [information collection requests], to help control `outlaw forms'")." *Dole v. Steelworkers*, 494 U.S. 26, 40 fn. 6 (1990). Based upon each of these claims the Commissioner entered no evidence that anyone could rely upon to dispute these claims made

by Appellant.

If there was any doubt as to the Internal Revenue Service right to claim any exemption that right should forever be buried in favor of compliance with the Act of 1995. The panel on the last page took a shot at explaining the "exemption amount" that triggers whatever section 6012, as a theory, is intended to trigger. That theory is based upon "cost of living" that is after the fact. The consumer price index that is no only also based upon theories, but those applicable are after the fact. Then there is determination by the panel that the trigger is a "statutory formula." Order @ 6 What is that?

This would mean under the Panel theory a person is required to make something if their gross income exceeds a formula! This alters the meaning of "required by law" to "required by formula."

The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. See, e.g., *United States v. Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting); *Barlow v. United States*, 7 Pet. 404, 411 (1833); *Reynolds v. United States*, 98 U.S. 145, 167 (1879); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Liparota v. United States*, 471 U.S. 419, 441 (1985) (WHITE, J., dissenting); O. Holmes, The Common Law 47-48 (1881). **Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law**. Cheek v. U.S. 498 U.S. 192, 199 (1991)

This common law rule has been applied by the Court in numerous cases construing criminal statutes. See, e.g., *United States v. International Minerals & Chemical Corp*., 402 U.S. 558 (1971); *Hamling v. United States*, 418 U.S. 87, 119-124 (1974); *Boyce Motor Lines, Inc. v.*

United States, 342 U.S. 337 (1952). In *U.S. v. Winchell*, 129 F.3d 1093 (10th Cir. 1997) this Court held that "Willfulness, as construed by [Supreme Court] decisions in criminal tax cases, requires the government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek*, 498 U.S. at 201

The Supreme Court has further clarified their holding in *Cheek* by stating that "In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the **specific provision** of the tax code that he was charged with violating." *Bryan v. U.S.* 524 U.S. 184, 194 (1998); See, e.g., *Cheek v. United States*, 498 U.S. 192, 201 (1991).

What this Court's decision says regarding the "exemption amount" that triggers section 6012 goes to the heart of the "statutory origin theory" as well as to the meaning and required proof of willfulness. Under the "theory" the Government would need to prove that a person sought to be penalized for not making a form 1040 timely would need to be shown to have specific awareness of section 7203, 6012, 6651, 151(d), 1(f)(3)-(6), the "cost of living adjustments", the "Consumer Price Index", the "statutory formula", and all the regulations, revenue procedures, and divisions among the different Circuits that the Government was arguing different theories regarding the same law therein.

Making reference to the requirement to make a Form 1040 as a "statutory origin theory" is colorable at best. Like the application of the Paperwork Reduction Act of 1980 and 1995, Appellant is certain this Court recognizes that if the Attorneys for the Commissioner cannot argue uniformly the same claims regarding the very clear language of the Paperwork Reduction

Act of 1980 and 1995, that non uniform principal will only become clouded with more conflicting theories when they attempt to argue the meaning of section 6012(a) and the "exemption amount" trigger.

The Commissioner claims section 6001, 6011, and 6012(a) and their regulations require the making of a Form 1040. Suppose, you remove the "regulations" and then what would the theory be? There is no request for information that hinges upon a request form to be made that can escape the Paperwork Reduction Act of 1995. None, including the Form 1040.

Yet, after quoting the *Dole* and *Collins* decisions, this Panel decided to place in another footnote that the 1040 "might be excepted from the provisions of § 3512 under the statutory origin theory discussed but neither adopted nor rejected in *United States v. Dawes*, 951 F.2d 1189, 1191-92 (10th cir. 1991)." Order @ 5

That conclusion cited above is simply erroneous. It is double speak. The 7th Circuit in *Salberg v. U.S.*, 969 F.2d 379 (7th Cir. 1992) stated that "It was a federal statute - 26 U.S.C. § 7203 - not a regulation or an instruction book that required Salberg to file an income tax return." In *U.S. v. Neff*, 954 F.2d 698 (11th Cir. 1992) the 11th Circuit stated "Congress created Neff's duty to file the Returns in 26 U.S.C. § 6012(a)." In *U.S. v. Wunder*, 919 F.2d 34 (6th Cir. 1990) the 6th Circuit stated "Defendant was not convicted of violating a regulation but of violating a statute which required him to file an income tax return. See 26 U.S.C. § 6012 and 7203." Then the 5th Circuit stated in *U.S. v. Kerwin*, 945 F.2d 92 (5th Cir. 1991) "like the taxpayer in *Wunder*, was convicted of that statute..."

So, where is the origin of the statutory theory "neither adopted nor rejected" by the 10th Circuit in Dawes? Is it 7203 which is a criminal provision incorporating "when required by this

title...or by regulation promulgated thereunder..."? Is it section 6012 with the "statutory formula"? Is it section 6001, 6011, 6012(a) and their regulations as claimed by the Commissioner? Does it originate as a criminal or civil statute? And what about those indexes and adjustments?

Congress wrote a definition for the term "penalty" in section 3502(14) in the Paperwork Reduction Act of 1995 which excepted nothing.

Appellant respectfully requests the Panel enter an order choosing to rehear this issue and set aside its order of January 4, 2007, and enter an order that stops dancing around the fact that Form 1040 is an information collection request and that it is not "excepted" from 3512 or any other provision.

4. Remand was appropriate with regard to whether or not the Form 1040 for years 1995 through 2001 violated the Paperwork Reduction Act of 1995.

Instead of remanding this Case to Tax Court this Panel decided to "deny his claim" and "reject his argument". Order @ 5-6. This Court has remanded in cases like *Consolidated Man v. CIR.*, 249 F.3d 1231, 1240 (10th Cir. 2001)("We leave it to the tax court to make this determination on remand.") If this Court decides to allow the door to swing both ways with regard to the Form 1040 not being in the record and it chooses to allow the Commissioner's claims to remain in the Tax Court, even though this Court has now found these deficiencies within the record of the Commissioner's claims, and if this Court chooses not to reverse in favor of Appellant with specific direction to Grant Appellant's requested relief therein, Appellant would respectfully request the issue regarding the Paperwork Reduction Act of 1995 violations be remanded to the Tax Court for administrative adjudication first.

5. Just looking at Form 1040 will not satisfy the invalidity claims made by Appellant with regard to whether Form 1040 displays a valid OMB control number.

The Panel decided that the test is whether the 1040 complies with "those requirements." Order @ 5. Those requirements are 1) a valid control number assigned by the Office of Management and Budget (OMB) and 2) proper notice that a person is not required to respond unless a valid control number is displayed. Order @ 4. This is not the test as to # 1. Just because OMB may have "assigned" a "control number" does not make it valid. As this Court stated while quoting the Paperwork Reduction Act of 1995, "the collection of information does not display a valid control number assigned by the Director '**in accordance with this subchapter**..'" Order @ 4

Just because a number is "assigned" does not mean that it was "assigned in accordance with this subchapter." Just because it appears on any form does not make it assigned nor assigned properly. The simple fact none of the requirements the Director was to insure existed on Form 1040 exist on Form 1040 shows the Director did not do his duty under section 3506. The fact the Commissioner does not dispute the Form fails to contain the "proper notice" should have been enough for this Court to rule in Appellant's favor. Having said that, the fact none of section 3506 appears on Form 1040, should leave this Court with confidence that Form 1040 was not reviewed by the Director, or anyone else for that matter, prior to IRS making the request to Appellant.

Appellant respectfully requests the Panel to set its decision aside in this regard and either rule in Appellant's favor or remand with instruction for the Tax Court to fully consider the Paperwork Reduction Act of 1995 defense claims made by Appellant, by adjudicating each claim

of Appellant. Look, if Form 1040 contains all the requirements that 3506 and 3512 require then it should be no difficult task for the Commissioner to prove that and the Tax Court to address each violation and put them to rest. But, if it cannot, and it cannot, then the Commissioner should not prevail on any of its claims as they directly and purposefully violate the Paperwork Reduction Act of 1995.

6. The Exemption Amount the IRS claims applies for 1995 through 2001 is not published in any regulation made available to the public.

If the IRS is going to derive claims based upon the ultimate numerical value they set for the term "exemption amount" under section 151(d) for each taxable year then the IRS should have to report that exact amount, prior to the year it applies, at least within the Code of Federal Regulations. They do not report the amount for each year and they certainly do not publish it prior to the year it applies. Yet, the Panel held that "cost of living adjustment" along with the "Consumer Price Index" plus $ 2000 equals the "statutory formula." Order @ 6. This is not to say that Appellant agrees the amount can be written by the IRS. Congress should write that amount prior to the year that it applies and they should use numbers and not letters to set the value for each distinct year.

As more fully argued in part 3 above, there is no way to create a statutory origin theory with all the different theories that exist. This is why Congress passed the Paperwork Reduction Act of both 1980 and 1995. If the law is not specific and the law is defined as a formula, the Panel should not have rejected Appellant's defense claims regarding the Commissioner's claims imposing penalties and other additions. If those penalties are triggered by a formula, and that is a theory, the decision by this panel to "reject his argument" is clearly erroneous.

CONCLUSION

Appellant respectfully requests the Panel set their January 4, 2007, decision aside, fully considering all the issues herein and those raised by Appellant in his brief in this case, and issue an Order either in Appellant's favor and against the Commissioner for the relief sought by Appellant or for an Order of remand to the Tax Court with specific instruction to direct a finding of fact as to each claimed violation contained upon Form 1040 for years 1995 though 2001 made by the Secretary of the Treasury and the Commissioner of the Internal Revenue Service.

Alternatively, if the Panel decides not to rehear this case then Appellant respectfully requests the entire United States Circuit Court of Appeals for the 10th Circuit sitting En Banc, issue an order to hear this case and to render either the decision in Appellant's favor and against the Commissioner or to order remand with the specific instructions regarding the Tax Court to address the claimed violations made by Appellant herein.

Respectfully Submitted

_____ _____

Date Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON February 16, 2007, I sent a copy of Appellant's Petition for Rehearing and for Rehearing En Banc by first class mail to:

Robert L. Baker
Department of Justice
P.O. Box 502
Washington D.C. 20044

_____
Server

February 16, 2006