

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**UNITED STATES OF AMERICA**

**-vs-**

**CAUSE NO. A-06-CR-069-SS**

**CHARLES THOMAS CLAYTON**

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**A M E N D E D O R D E R**<sup>1</sup>

BE IT REMEMBERED on the 28th day of July 2006, the Court called the above-styled cause for a hearing, and the parties appeared through counsel. Before the Court were Defendant's Motion to Dismiss Counts 3 Through 8 for Lack of Filing Requirement [#16], Defendant's Motion to Dismiss Counts 3 Through 8 for Failure to Comply with the Paperwork Reduction Act [#17], Defendant's Motions in Limine [#18, 19], Defendant's Motion to Compel Disclosure of the Government's Trial Exhibits [#20], Defendant's Motion to Compel Discovery of Personnel Files [#21], Defendant's Motion to Inspect Jury Records [#22], Defendant's Motion for Disclosure of Information Regarding the Jury Panel and Jury Contact [#23], Defendant's Motion for Disclosure of the IRS Special Agent's Report [#24], the Government's Response [#25], and Defendant's Reply [#28]. Having considered the motions, the Government's response, Defendant's reply, and the arguments presented at the hearing, the Court now confirms its oral announcements with the following written opinion and orders.

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<sup>1</sup> This Order supercedes the Order previously entered by this Court on August 2, 2006.

## **Background**

Defendant Charles Thomas Clayton, a radiologist, was indicted by the grand jury in April 2006 for violations of 26 U.S.C. § 7206(1)—willful subscription to false income tax returns—and § 7203—willful failure to file federal income tax returns. The indictment alleges that Clayton did not file federal income tax returns for calendar years 1999 through 2004 although he received gross income totaling approximately \$1.5 million during that time period.

## **Discussion**

### **I. Defendant’s Motion to Dismiss Counts 3–8 for Lack of Filing Requirement [#16]**

Defendant moves to dismiss Counts 3 through 8 of the indictment, for failure to file income tax returns, because the statutes and regulations do not provide notice of the threshold filing requirement. Defendant asserts his Fifth Amendment right of due process, claiming a lack of notice that his failure to file tax returns was illegal and/or that 26 U.S.C. § 6012 is ambiguous as to the exemption amount that triggers the filing requirement. Defendant argues that the exemption amount does not appear in the code or the federal regulations; therefore, its appearance in other IRS publications is not “law” with which American citizens are required to comply.

The Court agrees with the Government that Defendant could easily have determined the exemption amount triggering the filing requirement in every year at issue by: (1) simply reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which state the exemption amount, or (2) going through the process of cross referencing the statutes, regulations, and the consumer price index to calculate the figure referenced in option one. The statutory requirement to file income tax returns is located in 26 U.S.C. §§ 6001, 6011, and 6012, while § 7203 makes the willful failure to file income tax returns a criminal offense. *See United States v. Bowers*,

920 F.2d 220, 221–23 (4th Cir. 1990) (upholding convictions in a tax evasion case because the federal regulations set forth sufficient advice on how to obtain the forms or information necessary to prepare a tax return). Here, if Defendant had taken the time to follow the cross references within the statutes and regulations, he would have been able to determine the amount of gross income that triggers the duty to file a tax return. Accordingly, Defendant’s motion to dismiss is denied.

## **II. Defendant’s Motion to Dismiss Counts 3–8 for Failure to Comply with the Paperwork Reduction Act [#17]**

Next Defendant moves to dismiss Counts 3–8 for failure to comply with the Paperwork Reduction Act (“PRA”) because the forms for the subject years do not contain correct OMB numbers, or otherwise have PRA defects, so the Government has failed to comply with the PRA, 44 U.S.C. § 3512. Defendant essentially argues that the 1995 amendment to 44 U.S.C. § 3512 so changed the Act that pre-1995 case law holding that a PRA violation does not bar a criminal prosecution for failure to file a tax return is no longer controlling. *See United States v. Kerwin*, 945 F.2d 92, 92 (5th Cir. 1991) (upholding conviction for willful failure to file an income tax return under § 7203 because the PRA does not apply to the statutory requirement that a taxpayer file an income tax return); *United States v. Hicks*, 947 F.2d 1356, 1359–60 (9th Cir. 1991) (holding that Congress did not intend to repeal § 7203 by enacting the PRA).

Defendant’s argument is unavailing because those courts that have examined the issue post-1995 have decided that the PRA does not invalidate the statutory requirement to file tax returns. *United States v. Ouwenga*, 173 F. App’x 411, 417 (6th Cir. 2006); *Alford v. United States*, No. 3:02-CV-1719-M, 2002 WL 31415800 (N.D. Tex. Oct. 22, 2002); *United States v. Foster*, No. CRIM.97-700103JMRRLE, 1997 WL 685371 (D. Minn. May 27, 1997). Additionally, the regulations

implementing the PRA of 1995 explicitly provide that the PRA does not “preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed on the person by statute—e.g., 26 U.S.C. § 6011(a) (statutory requirement for a person to file a tax return)”). 5 C.F.R. § 1320.6(e). Accordingly, Defendants motion is denied.

### **III. Defendant’s Motions in Limine [#18, 19]**

Defendant’s first motion in limine [#18] requests that the Government be prohibited from “appealing to the jury’s prejudice, emotion, or pecuniary interest during trial,” and Defendant’s second motion in limine [#19] seeks to prevent the Government from offering into evidence Defendant’s prior conviction for failure to file a tax return and Defendant’s bankruptcy.<sup>2</sup> For the reasons stated at the hearing, both motions in limine are denied. This denial is not an order of admissibility; rather, admissibility determinations will be made after proper objection at the proper time during trial.

### **IV. Defendant’s Motion to Compel Disclosure of the Government’s Trial Exhibits [#20]**

Defendant moves for an order directing the Government to disclose the exhibits it plans to use at trial, and the Government opposes the motion. The Court notes that the Government has an open file discovery policy. For the reasons set forth during the hearing, the motion is granted, and the Government shall provide Defendant with inclusive lists of both exhibits and witnesses it plans to use at trial by August 14, 2006. Likewise, Defendant shall produce to the Government by August 17, 2006, its trial exhibit and witness lists.

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<sup>2</sup> As for the bankruptcy evidence, Defendant has objected to an order signed and agreed to by Defendant.

**V. Defendant's Motion to Compel Discovery of Personnel Files [#21]**

Defendant moves for an order directing disclosure to Defendant of the personnel files of government witnesses, or, in the alternative, for *in camera* review of those files with a determination of whether the files should be disclosed to the Defendant. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), provides that the Government must “disclose information favorable to the defense that meets the appropriate standard of materiality . . . . If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation . . . .” *Id.* at 30–31 (quoting *United States v. Cadet*, 727 F.2d 1453, 1467–68 (9th Cir. 1984). “[T]he government has a duty to examine personnel files upon a defendant’s request for their production.” *Henthorn*, 931 F.2d at 31. “However, following that examination, the files need not be furnished to the defendant or the court unless they contain information that is or may be material to the defendant’s case.” *Id.*

Therefore, the Court orders the Government to have available in Austin all personnel files of testifying witnesses employed by the government by August 14, 2006, to allow for in camera inspection by the Court.

**VI. Defendant's Motion to Inspect Jury Records [#22] and Defendant's Motion for Disclosure of Information Regarding the Jury Panel and Jury Contact [#23]**

For the reasons stated at the hearing, both motions are denied. Defendant shall have access to information about the jury panel on the morning of jury selection, as the jurors do not prepare questionnaires until that time. The Government stated on record that it did not possess information about the jury panel at this time. If the Government does come to possess such information between the time of the hearing and the beginning of trial, it shall disclose such information to Defendant.

As it stands, the Government, the Defendant, and the Court will get the same information about the jury panel at the same time, which is the morning of jury selection.

**VII. Defendant's Motion for Disclosure of the IRS Special Agent's Report [#24]**

As stated at the hearing, Defendant's motion is granted. The Government shall provide the Court with a complete copy of the Special Agent's Report recommending prosecution and with an affidavit from the IRS Special Agent that the copy provided is complete and nothing has been removed from it.

**Conclusion**

In accordance with the foregoing:

IT IS ORDERED that Defendant's Motion to Dismiss Counts 3–8 for Lack of Filing Requirement [#16] and Defendant's Motion to Dismiss Counts 3–8 for Failure to Comply with the Paperwork Reduction Act [#17] are DENIED;

IT IS FURTHER ORDERED that Defendant's Motions in Limine [#18, 19] are DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Compel Disclosure of the Government's Trial Exhibits [#20] is GRANTED and the Government shall provide Defendant with inclusive lists of both exhibits and witnesses it plans to use at trial by August 14, 2006. Likewise, Defendant shall produce to the Government by August 17, 2006, its trial exhibit and witness lists;

IT IS FURTHER ORDERED that Defendant's Motion to Compel Discovery of Personnel Files [#21] is GRANTED as set forth above;

IT IS FURTHER ORDERED that Defendant's Motion to Inspect Jury Records [#22] and Defendant's Motion for Disclosure of Information Regarding the Jury Panel and Jury Contact [#23] are DENIED; and

IT IS FINALLY ORDERED that Defendant's Motion for Disclosure of the IRS Special Agent's Report [#24] is GRANTED.

SIGNED this the 2nd day of August 2006.

  
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SAM SPARKS  
UNITED STATES DISTRICT JUDGE