No. _____

In The

Supreme Court of the United States

MICHAEL CHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER IT WAS A VIOLATION OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR THE FEDERAL GOVERNMENT TO CHARGE PETITIONER WITH MAIL FRAUD FOR UNDER-REPORTING INCOME TO A STATE WHEN THAT STATE FAILED TO PROSECUTE PETITIONER FOR VIOLATION OF ITS OWN TAX LAWS.

2. WHETHER THE FEDERAL GOVERNMENT VIOLATED PETITIONER'S FOURTH AMENDMENT RIGHTS WHEN IT SEIZED ATTORNEY-CLIENT PRIVILEGED INFORMATION AND DOCUMENTS ARISING FROM A MEETING AMONG PETITIONER, PETITIONER'S ATTORNEY AND PETITIONER'S ACCOUNTANT, WHEN THE PURPOSE OF SUCH MEETING WAS TO PREPARE FOR THE UPCOMING CRIMINAL TRIAL, AND THEN LATER OFFERED AT TRIAL TESTIMONIAL AND DOCUMENTARY EVIDENCE IT OBTAINED REGARDING THIS MEETING.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Ninth Circuit, whose judgment is sought to be reviewed, are:

- Michael Chen
- United States of America

No corporations are involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Michael Chen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's Memorandum opinion filed March 20, 2014 affirming the district court's judgment of conviction and sentence, the subject of this petition, was not certified for publication. (Appendix ["App."] 1.)

On February 5, 2013, the district court sentenced Petitioner to a term of imprisonment of thirty-three (33) months and two (2) days, to be followed by a period of supervision of three (3) years, restitution in the amount of $495,105 and criminal monetary penalties of $1,950.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its opinion on March 20, 2014. (App. 1.) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the Ninth Circuit's March 20, 2014 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment X to the United States Constitution

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

18 U.S. Code § 1341 – Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated [sic] or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any

matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings, Disposition in the Court Below, and Bail Status.

On February 12, 2009, Petitioner was named in a two-count indictment charging him with violation of 26 United States Code § 7201 (tax evasion). (Appellant's Excerpt of Record ("AER") 3-4, 515.)

On February 18, 2009, Petitioner was arraigned and the case was assigned to the docket of The Honorable Maxine M. Chesney. (AER 515.)

On November 19, 2009, Petitioner was named in a six-count Superseding Indictment charging him with violation of 26 United States Code § 7201 (tax evasion), 26 United States Code § 7206(1) (subscribing to false return) and 26 United States Code § 7203 (failure to file tax return). (AER 8-11, 518.)

On December 31, 2009, Petitioner was named in a twenty-four count Second Superseding Indictment charging him with violation of 26 United States Code § 7206(1) (subscribing to false return), 18 United States Code § 2(b) (aiding, abetting and causing the subscribing of false tax returns), 26 United States Code § 7203 (failure to file tax return), and 18 United States Code § 1341 (mail fraud). (AER 25-36, 520.)

On February 29, 2012, and again on March 14, 2012, the Government moved to dismiss Counts Four, Five and Six of the Second Superseding Indictment which had charged Petitioner with filing a false United States Individual Tax Return for the years 2004, 2005 and 2006 in violation of 26 United States Code § 7206(1). (AER 154-56, 165-67, 195, 527-28.)

On March 15, 2012, trial commenced. (AER 195, 528.) On March 27, 2012, the jury rendered its verdicts of guilty on all twenty-one counts. (AER 189-195, 530.)

On February 5, 2013, Petitioner was sentenced to a term of imprisonment of thirty-three (33) months and two (2) days, to be followed by a period of supervision

of three (3) years, restitution in the amount of $495,105 and criminal monetary penalties of $1,950. (AER 466-71, 537.)

On February 11, 2013, Petitioner filed timely his Notice of Appeal. (AER 477-87, 537.)

On or about April 10, 2013, the Honorable Maxine M. Chesney, United States District Court Judge, granted Petitioner's motion for bail pending appeal. (AER 503, 539.)

On May 17, 2013, the Honorable Nandor J. Vadas, United States Magistrate Judge, set a bail hearing for June 14, 2013 (the date of said hearing is after the filing of this Opening Brief.) (AER 540.)

On March 20, 2014, the Ninth Circuit filed its opinion. (App. 1.)

B. Statement of Facts.

In October of 2004, Petitioner opened Fune Ya, a Japanese-style sushi restaurant, in San Francisco, California. (AER 385.) Aside from Fune Ya, Petitioner also had an ownership interest in other restaurants called House of Clay Pot and House of Clay Pot I. (AER 152, 171, 453-54.)

On January 31, 2007, Internal Revenue Service ("IRS") agents from the Criminal Investigation Division ("CID") executed a search warrant on Fune Ya. (AER 150-53.) The search included the restaurant along with Petitioner's part-time residence in an upstairs portion of the restaurant where he also

maintained a personal office. The IRS-CID seized evidence relating to the period of October 2004 through December 31, 2006. (AER 150-53, 386, 397.)

In the Second Superseding Indictment, filed on December 31, 2009, Petitioner was charged with violation of the following statutes:

- 26 U.S.C. § 7206(1) for allegedly filing a false Form 1120S for the year 2004 which under-reported Fune Ya's gross receipts and filing false Employer's Quarterly Federal Tax Return (i.e., Form 941) which allegedly under-reported wages paid to Fune Ya employees for the years 2004 through 2006. These charges were contained in Counts 1 and 4 through 15.
- 26 U.S.C. § 7203 for allegedly failing to file Forms 1120S for Fune Ya for 2005 and 2006. These charges were contained in Counts 2 and 3.
- 18 U.S.C. § 1341 for using the United States mails to send allegedly false State, Local and District Sales and Use Tax Returns for Fune Ya, which under-reported gross sales to the California Board of Equalization for nine consecutive quarters in the years 2004 through 2006. (AER 26-36.) These charges were contained in Counts 16 through 24. (AER 26-36.)

The crux of the Government's theory of criminal liability was that Petitioner consistently failed to report cash receipts and cash payroll on various tax filings. As the Government stated:

> "Between 2004 and 2008, [Petitioner] owned Fune Ya restaurant. During this time, some of Fune Ya's business was done in cash. [Petitioner] failed to report his cash receipts and his cash payroll to the California State Board of Equalization and the Internal Revenue Service. In February 2009, the Grand Jury returned an indictment charging [Petitioner] with various tax charges." (AER 45.)

On December 9, 2009, Petitioner, Petitioner's attorney and Petitioner's accountant (Tony Gu) met to prepare for trial. (AER 43.) Mr. Gu took notes at this meeting. (AER 43, 71-72.) Petitioner believed that the information and documents given to Mr. Gu at this meeting would be confidential until Petitioner authorized their release. (AER 110.)

Also on December 9, 2009, Petitioner filed his Witness List. (AER 12-13.) Included on Petitioner's Witness List was Tony Gu who was described as "Accountant, House of Clay Pot and House of Clay Pot I." (AER 13.)

On December 11, 2009, Petitioner filed his First Amended Witness List. (AER 14-16.) Included on Petitioner's First Amended Witness List was Tony Gu who was again described as "Accountant, House of Clay Pot and House of Clay Pot I, Expert Witness." (AER 15.)

On December 14, 2009, Petitioner filed his Second Amended Witness List. (AER 17-18.) Included on Petitioner's Second Amended Witness List was Tony Gu who was again described as "Accountant, House of Clay Pot and House of Clay Pot I, Expert Witness." (AER 18.)

On December 15, 2009, Petitioner filed his Notice of Intent to use Tony Gu as a summary-expert witness at trial. (AER 20-22.)

Following the filing of Petitioner's witness lists, and notice regarding summary-expert witness, on December 15, 2009, Agents of the IRS-CID went to Mr. Gu's office and obtained spreadsheets from Fune Ya, Quickbooks reports of Fune Ya, and a disk containing the Quickbooks file of Fune Ya. (AER 43-44, 59.) The IRS Agents also reviewed the notes of the meeting that occurred between Petitioner, Petitioner's attorney and Mr. Gu. (AER 59.) While the IRS-CID agents gave Mr. Gu a trial subpoena at this first visit, it failed to list any documents to produce at trial. (AER 42-44.)

On December 16, 2009, Mr. Gu faxed to the IRS-CID agents his notes of the meeting that occurred among Petitioner, Petitioner's attorney and Mr. Gu. (AER 59, 71-72, 112.) The notes included the following notation:

"Note Info. on QB is not complete. Wait for client bring cash sales. GGS & expenses this Friday. Client does not know how to enter cash transaction on QB)" (AER 71.)

On or about December 30, 2009, an IRS-CID Agent called Mr. Gu and told him that she and other agents would come the next morning and ask him more questions. (AER 43.)

On December 31, 2009, IRS-CID agents came to Mr. Gu's office "and demanded that [he] give them all documents and materials that [he] was using to prepare Mr. Chen's amended tax returns." Mr. Gu "felt intimidated by the agents' demands and felt [he] had no option but to turn over the material they demanded." (AER 43.) In this second encounter, the IRS-CID Agents did not give Mr. Gu "a warrant, subpoena, or any court order." (AER 43.)

In all of these unwelcome interactions with the IRS-CID agents, Mr. Gu felt "intimated [sic]" and felt that he had "no option" other than to comply with the demands of the IRS Agents. Mr. Gu declared as follows:

> "At the time I met with the IRS agents on December 15, 2009, at the time I faxed documents to them on December 16, 2009, and at the time I gave documents to them on December 31, 2009, I felt intimated [sic] by the agent's demands and felt I had no option to turn over the material they demanded." (AER 113.)

At trial, the Government called Mr. Gu as its witness and he testified to both the contents of the confidential meeting with Petitioner and Petitioner's attorney in preparation for trial, and his handwritten notes of the confidential meeting. (AER 168-88, 209.)

Moreover, the notes themselves were admitted into evidence. (AER 173-88, 209, 492-96, 499.)

At the conclusion of trial, the jury rendered a verdict of guilty on all counts. (AER 189-94, 216.)

C. The Ninth Circuit Upholds the Sentence and Conviction.

In a two-and-a-half-page memorandum decision, the Ninth Circuit upheld Chen's conviction and sentence, dismissing his appeal with broad, cursory language. The Ninth Circuit filed it opinion on March 20, 2014. (App. 1.)

REASONS TO GRANT THE PETITION

A. The District Court's Use of the Federal Mail Fraud Statute to Charge a Violation of State Tax Laws is Unconstitutional.

It was unconstitutional to charge Petitioner with mail fraud for submitting allegedly false tax documents to a State taxing authority, when Petitioner was instructed by the State to submit said tax documents by United States mail, and when it was unlikely that the State would file criminal charges for such conduct. Also, it was error to apply the federal tax sentencing guidelines for tax losses to a State.

Ms. Tse, an attorney and CPA who worked for the State Board of Equalization for 27 years, gave the following unrebutted testimony:

"10. With all of the above being considered, it is unlikely that this finding would be considered fraud. Even if this is considered to be fraud, this would be considered a civil fraud of 25% penalty, not criminal fraud subject to jail term." (AER 247.)

Despite this testimony, Petitioner was charged and convicted of mail fraud in regard to alleged non-payment of State taxes. However, as set forth herein, and as noted in pre-sentencing documents submitted by the defense, there was a constitutional problem in using the mail fraud statute to charge a violation of the State tax laws.

In this case, the evidence showed that the tax forms sent to Petitioner showed only a P.O. Box for the payment of the taxes, and for the address of the State Board of Equalization. (AER 388.) The forms are designed to be folded and returned in a window envelope to the address shown on the top left hand portion of the return. In every case, this is a U.S. Post Box address – and the only way for a taxpayer to get something into a U.S. Post Office Box is by use of the United States mails.

If the taxpayer follows the instructions provided by the State of California, the tax returns will be filed by mail to a U.S. Post Office Box. (AER 391.) This instruction to use the United States mails is given to every single California payer of sales or use taxes. Therefore, whatever criminal penalties California has adopted in its statutory scheme, balancing all of the State's interests, it assumes and requires that the

taxpayer make use of the United States mails in filing sales tax returns.

In this case, Petitioner, an in-State taxpayer doing business solely within the State of California, who was required by State law to mail his tax returns to the State Board of Equalization, was charged – not with the filing of false tax returns – but rather with the mailing of false tax returns. As such, the application of the federal mail fraud statute for conduct related solely to a failure to follow California tax laws adds an additional penalty to that already imposed by California for identical conduct.

Such a scheme is unconstitutional. *United States v. Constantine*, 296 U.S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935) is a Prohibition Case in which Mr. Constantine owned a restaurant in Birmingham and failed to pay a $1,000.00 excise tax. As a result, he was charged in an information for failing to pay the $1,000.00 excise tax imposed by Section 701 of the Federal Revenue Act. When Prohibition was in effect, the State had concurrent powers to enforce it. However, after Prohibition was repealed, the Supreme Court had to decide, in *Constantine*, whether the $1,000.00 federal excise tax enforced by the State was a punishment or a legitimate tax. The Circuit Court of Appeals found the Federal Revenue Act became inoperative upon the repeal of the Eighteenth Amendment and granted the defendant's motion for judgment. *Constantine*, 296 U.S. at 290. The United States Supreme Court upheld the dismissal for the defendant.

The United States Supreme Court found the excise tax was a penalty, and was repealed with the repeal of Prohibition. The Court found the statute (i.e., Section 701 of the Federal Revenue Act) was a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution:

> "We think the suggestion has never been made – certainly never entertained by this Court – that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications for a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's law inheres in the body of its citizens speaking through their representatives. So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth, the qualification has been abolished." [Emphasis added.]

United States v. Constantine, 296 U.S. 287, 295-296 (1935).

The point here is that the exaction is in no proper sense a tax but rather a penalty imposed in addition to any the State may decree for the violation of a State law. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through its representatives.

The Sentencing Guidelines were designed to carry out policies designed by, and for, the federal government. Every level of government must carefully balance various competing priorities in designing its penalties for tax crimes. The Sentencing Guidelines specifically balances competing interests of the federal government in collecting federal taxes. Nowhere in the tax discussion of the Sentencing Guidelines is a violation of State tax laws mentioned. California is entitled, under the Tenth Amendment, to find its own balance between collecting taxes and the civil and criminal penalties it chooses to impose on those who violate its tax laws. However, the federal government has no legitimate interest in the penalties imposed by California for willful failure to follow its tax laws.

This is not a situation where there is a criminal enterprise using the mails that results in profits that are then untaxed by the State. In this case, we have charges relating to the fraud of failing to pay the State its taxes. The State has already determined what should be the penalty for such conduct. California designed its instructions and forms instructing its citizens to utilize the United States mails to file sales tax returns.

Put another way, assuming that the mail fraud convictions stand, *Constantine* stands for the proposition that it is unconstitutional for the United States to impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The only "fraud" here is the violation of the State's criminal code by one of its own citizens, particularly since the State essentially requires, and at the very least strongly recommends, that the tax returns be returned by mail, not even providing a hint on the tax forms that there is any other way to file the return.

Since the State of California designs its sales tax return forms to be returned via United States mail, the criminal tax fraud statutes in California already assume that the taxpayer has used the mails to file the return, and imposed certain penalties. There is no new or different conduct that may be punished by the federal government, without running afoul of the principles set forth in *Constantine*.

To avoid this unconstitutional "over-reach" by the Government, the district court should have dismissed the mail fraud charges and granted a retrial or, at the time of sentencing, disregarded the unpaid State taxes. Either option would have avoided imposing an "additional" penalty to that set out by the State of California.

Moreover, public policy and the inapplicability of the Sentencing Guidelines to State taxes bars use of the mail fraud statute to charge an alleged loss of tax

revenues to a State. To permit the charging of State tax crimes as federal mail fraud crimes is bad public policy. Each State carefully calibrates its laws, and particularly its tax laws. To impose additional penalties for violation of a State's tax laws is unconstitutional as stated in *Constantine*. Indeed, the Introductory Comment to Part T of the Sentencing Guidelines makes it explicit that the criminal laws are designed to preserve the integrity of the Nation's tax system. The Sentencing Guidelines are written to deter federal taxpayers from violating federal tax laws. For example, in the Commentary to 2T1.9, Conspiracy to Impede, Impair, or Obstruct or Defeat Tax, the comments make clear that the defrauded party is the United States. There is no indication that the Sentencing Guidelines were intended to apply to the collection of State taxes. To apply federal policies and priorities, as set forth in the Tax Table and applicable to federal taxes, to each of the Fifty States, takes out of the hands of the States the manner in which their own tax laws will be enforced, since virtually all tax returns are filed via mail or wire.

Finally, nothing contained in the mail fraud statute (i.e., 18 U.S.C. § 1341), and its legislative history indicates Congress intended that acts and activities which result in a tax loss to a state could be the basis for a mail fraud charge. To adopt such a rule would be bad public policy because states enact their own tax laws, deciding what is criminal, what is not criminal, and what penalties should apply in each category. To apply federal policies and priorities (as

set forth in the United States Sentencing Guideline for tax offenses) would take enforcement of state laws out of the hands of the states.

Pursuant to the Tenth Amendment, California has the right to find its own balance in defining what tax matters are civil in nature and what are criminal. Moreover, it is unconstitutional for the United States to impose cumulative penalties above and beyond those imposed by California on its own residents. *See United States v. Constantine,* 296 U.S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935)[1]

If the federal government can constitutionally charge mail fraud for violation of state tax laws then there would be no reason why the federal government could not also charge mail fraud for purported violation of the laws of a foreign country. Such use of the mail fraud statute would further be unconstitutional because it would be "void for vagueness" because a determination of whether one committed mail fraud

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[1] As the Court stated in *United States v. Constantine*, 296 U.S. 287, 295-296 (1935):

> "The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's law inheres in the body of its citizens speaking through their representatives. So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth, the qualification has been abolished." [Emphasis added.]

would be dependent on interpretation of foreign law. *See Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971).

B. The Government Violated Petitioner's Fourth Amendment Rights When it Seized Attorney-Client Information and Documents from a Meeting which Occurred Among Petitioner, Petitioner's Attorney and Petitioner's Accountant, the Purpose of Which Was to Prepare for Petitioner's Upcoming Criminal Trial.

1. The Government's Violation of Petitioner's Fourth Amendment Rights is Unconstitutional.

The Government acted illegally and improperly when it "invaded the defense camp" by seizing documents of Petitioner's accountant, Tony Gu, including Mr. Gu's notes of the contents of a privileged meeting he had with Petitioner and Petitioner's lawyer. These privileged notes were later admitted into evidence in the trial. While some documents seized by the IRS-CID agents were later disclosed by Petitioner's attorney, the notes of the meeting with Petitioner and Petitioner's attorney were not. In addition to these handwritten notes, other documents seized by the IRS-CID agents were never disclosed by Petitioner nor his attorney. (AER 118.)

Following the filing of Petitioner's witness lists, Agents of the IRS visited Mr. Gu on December 15 and 31, 2009. (AER 43, 58, 112-13.) In the second

encounter, using Mr. Gu's description, the IRS-CID agents "intimidated" him and he turned over his documents, including privileged documents. The IRS-CID agents then left with the documents without presenting to him a "warrant, subpoena, or any court order." In this regard, Mr. Gu declared:

> "I, Tony Gu, do hereby declare as follows:
>
> 1. I have a personal knowledge of statements herein and if called to testify on the matter I would do so competently.
>
> 2. On December 9, 2009 Michael Chan (sic) and his defense attorney at the time, Robert Cummings, came to my office at Clement Tax Services and asked me to prepare amended payroll tax and corporate income tax returns for Fune Ya restaurant for the years 2004 through 2006.
>
> 3. Mr. Chan (sic) and his attorney made the request in preparation for a January 5, 2010 trial.
>
> 4. On December 15, 2010 three IRS Special Agents came to my office to investigate Fune Ya's tax documents.
>
> 5. During the visit the agents gave me a subpoena to appear and bring records in Mr. Chan's criminal trial on January 5, 2010.
>
> 6. The subpoena the agents gave me referred to an attached document, but no document was attached.
>
> 7. On or about December 30, 2009, an agent, Andrea Bishop, called me and told me

that she and other agents would like to come the next morning and ask me some questions.

8. On the morning of December 31, 2009, the agents came to my office and demanded that I give them all documents and materials that I was using to prepare Mr. Chan's [sic] amended tax returns. They did not give me a warrant, subpoena, or any court order.

9. I felt intimidated by the agents' demands and felt I had no option but to turn over the material they demanded.

10. I then turned over all of the material the agents demanded.

Dated: February 7, 2011 /s/Tony Gu" (AER 42-44.)

In a supplemental declaration, Mr. Gu declared:

"I, Tony Gu. [sic] declare:

1. I have reviewed the 'Supplemental Declaration of Bryan Wong In Support of United States' Supplemental Opposition To Defendant's Motion To Suppress' dated March 8, 2011.

2. I met with IRS agents at my office on December 15. [sic] 2009 per their request and (a) provided and/or showed them the various documents described in paragraphs 5., 6., 8. of Agent Wong's Supplemental Declaration and (b) provided them with a disk containing the 'Quickbooks file for Fune Ya Japanese Restaurant as of December 15,

2009' as described in paragraph 7. of Agent Wong's supplemental declaration.

3. On December 16, 2009 I faxed to the IRS agents the documents that they demanded.

4. I keep all documents and information provided by my tax clients in separate physical files and separate computer files organized by the name of the client and sub-organized by tax year. The computer files are kept in a computer that is located in my office with log in name and password. I am the only one with access to this computer. All of the documents I provided to IRS agents on December 15. [sic] 16, and 31, 2009 were kept confidential until that time. At the time I met with the IRS agents on December 15, 2009, at the time I faxed documents to them on December 16, 2009, and at the time I gave documents to them on December 31, 2009, I felt intimidated by the agent's demands and felt I had no option but to turn over the material they demanded.

I declare under penalty of perjury that the foregoing is true and correct except as to those matters stated on information and belief and as to those matters I believe them to be true.

Executed at San Francisco, California on May 10, 2011. /s/Tony Gu" (AER 112-13.)

On February 8, 2011, Petitioner filed his motion to suppress, challenging the legality of the seizures

by the IRS-CID agents. (AER 523.) On May 11, 2011, Petitioner filed an amended motion to suppress. (AER 97-113, 524.) The motion to suppress was denied on September 7, 2011. (AER 131-49.) The district court held that Petitioner did not have standing to challenge the disclosure of information he gave to his tax preparer. (AER 147.)

After the Court denied the Motion to Suppress, Mr. Gu was called by the Government at trial and he testified about what he learned (in particular in regard to the issue of cash) during his joint meeting with Mr. Robert Cummings (Petitioner's defense attorney) and Petitioner. (AER 168-88.) This testimony significantly prejudiced Petitioner.

Thus, some of the most incriminating evidence presented at trial came from the contents of a meeting that defense counsel had with Mr. Gu which was in preparation for the upcoming criminal trial. Yet, the disclosures by Mr. Gu were explicitly prohibited by 26 U.S.C. Section 7216 (a)(1) and (2) because the information was furnished to him by Petitioner " . . . for, or in connection with, the preparation of a tax return" and Mr. Gu provided that information to the IRS agents, and at trial, for a purpose "other than to prepare . . . or assist in preparing any such return."

By seizing the above-described records, the Government "invaded the defense camp" because the seized material was protected both by the attorney-client privilege and the work product doctrine. The contents of the meeting at issue was covered by California's attorney-client privilege. *See Insurance*

Co. of North America v. Superior Court, 108 Cal.App.3d 758, 763, 166 Cal.Rptr. 880, 883 (1980); California Evidence Code § 950, *et seq*.

Moreover, compounding the Government's error, at trial, the prosecutor repeatedly asked Mr. Gu about such documents, and had many such documents admitted into evidence, even though the documents were prepared at the request of trial counsel. As such, the conduct of the Government warranted dismissal of the Indictment, or at a minimum, suppression of the evidence illegally seized from Mr. Gu.

2. "Invasion of the Defense Camp" by the Government Warranted Dismissal of the Indictment.

The principle of "Invasion of the Defense Camp" by the Government can be the basis of dismissal of an Indictment. As the Ninth Circuit noted in *Clutchette v. Rushen*, 770 F.2d 1469 (9th Cir. 1985):

> "Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right. *See Maness v. Meyers*, 419 U.S. 449, 466 n.15, 42 L. Ed. 2d 574, 95 S. Ct. 584 (1975); *Beckler v. Superior Court*, 568 F.2d 661, 662 (9th Cir. 1978). ***In some situations, however, government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights.*** *See*,

> *e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977). ***Such an intrusion violates the Sixth Amendment only when it substantially prejudices the defendant.*** *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980); *see United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir.), *cert. denied*, 444 U.S. 860, 100 S. Ct. 124, 62 L. Ed. 2d 81 (1979).

The Supreme Court's decision in *Weatherford v. Bursey* governs Clutchette's case. There, an undercover government agent attended meetings between a criminal defendant and his attorney. The Supreme Court found no denial of the right to counsel. The Court carefully pointed out that the government had not deliberately invaded the defense camp. *See Weatherford*, 429 U.S. at 557. The agent, who was posing as a codefendant, attended the meetings only at the defendant's invitation. His purpose in attending, and the state's purpose in allowing his attendance, was to protect his undercover status, not to learn about the defendant's defense plans or to intrude on the lawyer-client relationship. *Id*. at 547-548, 557. Moreover, the agent's presence had not prejudiced the defendant by providing any information to be used against him at trial:

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and [his lawyer]; had any of the State's evidence originated in these

> conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the . . . conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554 (footnote omitted).

It is no different here. The state did not deliberately intrude into Clutchette's privileged relationship with his attorney. In all of the cases Clutchette cites, the government actively infiltrated the defense, either by planting informants or by intercepting confidential communications or by other means. *See*, *e.g.*, *Caldwell v. United States*, 92 U.S. App. D.C. 355, 205 F.2d 879 (D.C. Cir. 1953) (information obtained by government agent posing as a defense assistant); *Coplon v. United States*, 89 U.S. App. D.C. 103, 191 F.2d 749 (D.C. Cir. 1951) (government interception of telephone messages between the defendant and her attorney), *cert. denied*, 342 U.S. 926, 72 S. Ct. 363, 96 L. Ed. 690 (1952). Here, by contrast, the government's role was entirely passive: the police neither initiated the contact with Mrs. Clutchette nor encouraged her to turn over the receipts. She betrayed her husband voluntarily, and her actions, not the misconduct of government agents, caused the alleged breach in Clutchette's attorney-client relationship." *Clutchette*, 770 F.2d at 1471-1472.

Because here, the Government's invasion was intentional, not incidental to other conduct, and it extensively used the evidence seized from Mr. Gu, the Indictment should have been dismissed or, at a minium, the evidence seized from Mr. Gu should have been suppressed. It is respectfully contended that the district court erred when it failed to do so. (AER 131-49.)

3. A Taxpayer Should Have Standing to Object to the Seizure of His or Her Tax Information from a Tax Preparer.

In denying Petitioner's motion to suppress, the district court found that he had no standing to challenge the conduct of the IRS nor exclude the seized documents from trial. Petitioner, however, had standing to object to the IRS-CID's seizure of tax information from his tax preparer because he had a reasonable expectation that the information he provided to his tax preparer, Mr. Tony Gu, would be kept confidential. This expectation was grounded on numerous federal and state statutes which protected the confidentiality of tax return information, including 26 U.S.C. § 7216, which makes it a misdemeanor for a tax preparer to knowingly disclose a client's tax information to anyone unless that disclosure is made pursuant to a Court order, written permission of the taxpayer, or another provision of Title 26.

In *People v. Gutierrez*, 222 P.3d 925 (Colo. 2009), the Colorado Supreme Court rejected the prosecution's argument that Gutierrez had no standing to

object to the seizure of tax information provided to his tax preparer pursuant to a search warrant. Thus, *Gutierrez* is factually identical to the instant case except for the fact that the seizures herein were made without a warrant or other legal process. While the decision in *Gutierrez* is not controlling, Petitioner respectfully submits that the Colorado Supreme Court's analysis of federal and state law in support of its holding is both cogent and highly persuasive.[2]

A defendant's ability to invoke the protections of the Fourth Amendment depends upon whether the Government's conduct constituted an invasion into an area "in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968). Thus, Petitioner may assert the protections of the Fourth Amendment over the tax information he gave to Mr. Gu if he maintained a reasonable expectation of privacy in his file, or put another way, he maintained a reasonable

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[2] In that case, the Colorado Supreme Court stated:

" . . . both Colorado and federal law protect the privacy of tax return information even when it is in the custody of the IRS, a state department of revenue, or a tax preparer. In our view, this reflects a broad societal understanding that, when an individual prepares and files a tax return, he does so for the IRS and no one else. And he retains an expectation of privacy in such information against intrusion *by criminal law enforcement agencies, even when disclosed to others for the purpose of facilitating compliance with state and federal tax laws.*" *Gutierrez*, 222 P.3d 925 at 935 (Colo. 2009) (emphasis added).

expectation that Mr. Gu would keep the information in his file confidential.

In *Katz v. United States*, 389 U.S. 347, 361 (1967) the United States Supreme Court set forth a two-prong test for determining whether a defendant seeking to suppress evidence maintains a reasonable expectation of privacy in the area searched or the items seized. To satisfy the *Katz* test, a defendant must demonstrate: first, that he has exhibited an actual (subjective) expectation of privacy; and second, that the expectation [is] one that society is prepared to recognize as "reasonable." *Katz*, 389 U.S. at 361. *See United States v. Knotts*, 460 U.S. 276, 281 (1983) (quoting Justice Harlan's concurrence in *Katz*); *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (same).[3] As argued below Petitioner has clearly met his burden of proof as to both prongs of the *Katz* test.

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[3] As the United States Supreme Court recently stated in *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409, 185 L. Ed. 2d 495 (2013):

> "The Fourth Amendment provides in relevant part that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a 'search' within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' *United States v. Jones*, 565 U.S. ___, ___, n. 3, 132 S.Ct. 945, 950-951, n. 3, 181 L.Ed.2d 911 (2012).

(Continued on following page)

The first prong of *Katz*, *supra*, requires an "actual" expectation of privacy. The declarations of Petitioner and Mr. Gu filed in support of the motion to suppress demonstrate that the first prong of the *Katz* test has been satisfied. (AER 42-44, 110, 112-13.) Petitioner gave his tax information to Mr. Gu with the understanding that it would be kept confidential until he had advised Mr. Gu to the contrary. (AER 110.) Mr. Gu kept Petitioner's tax information in separate physical files and separate computer files organized by the name of the client and sub-organized by tax year. (AER 112-13.) The computer files were kept in a computer that was located in Mr. Gu's office with "log in" name and password protection and Mr. Gu was the only person with access to this computer. (AER 113.) Mr. Gu also stated that, prior to turning Petitioner's tax information over to the IRS agents, he kept all of that information confidential. (AER 113.) Petitioner was thus entitled to assume that his tax information would "not be broadcast to the world." *Katz*, 389 U.S. at 352.

> By reason of our decision in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), property rights 'are not the sole measure of Fourth Amendment violations,' *Soldal v. Cook County*, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) – but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government does engage in [a] physical intrusion of a constitutionally protected area," *United States v. Knotts*, 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring in the judgment)."

The second prong of *Katz*, *supra*, requires that Petitioner's expectation of privacy in the tax information provided to Mr. Gu is one "society is prepared to recognize as 'reasonable.'" *Katz*, *supra*. This prong is satisfied because Congress has declared that a taxpayer who has placed his or her tax return information in the custody of a professional tax preparer retains an expectation of privacy in such information. *See* 26 U.S.C. § 7216; *Gutierrez*, *supra*.

In order to ascertain the societal understanding of what constitutes a legitimate, reasonable privacy interest, the courts look to some "source outside of the Fourth Amendment." *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12 (1978). *See also Florida v. Riley*, 488 U.S. 445, 451 (1989) (plurality opinion) (looking to Federal Aviation Administration regulations to determine whether the defendant's expectation of privacy was objectively reasonable); *Doe v. Broderick*, 225 F.3d 440, 450-51 (4th Cir. 2000) (looking to federal statutes addressing the availability of a patient's medical records for purposes of criminal investigation to determine the scope of Fourth Amendment's protection of such records); *DeMassa v. Nunez*, 770 F.2d 1505, 1506-07 (9th Cir. 1985) (*per curiam*) (looking to state and federal statutes and case law to determine that an attorney's client had a reasonable expectation of privacy in his client file stored in the attorney's office). Thus, the Government's reliance on the fact that there is no accountant-client privilege and no Fifth Amendment privilege in documents provided to an accountant is irrelevant to the inquiry herein

which is based on Fourth Amendment standing issues.

Federal and state statutes which confer upon the taxpayer a legitimate expectation of privacy in his or her tax information are appropriate sources for an inquiry into whether society has recognized, as reasonable, an expectation in the privacy of information given to a tax preparer. The court in *Gutierrez* pointed out that every state in the country has passed legislation protecting the confidentiality of tax information and returns. *See Gutierrez*, 222 P.3d at p. 933) (*See* n. 7 for a compilation of those statutes.) Moreover, federal law clearly protects an individual's privacy interest in his or her tax returns. In *Gutierrez*, the court pointed out that, following the Watergate scandal of the 1970's, Congress significantly revised 26 U.S.C. § 6103 and other statutes to provide taxpayers with adequate assurances that the confidentiality of their returns would be safeguarded and conducted an exhaustive and comprehensive summary of the many changes made to § 6103 in order to effectuate Congress' intent in that regard. *Gutierrez*, 222 P.3d at pp. 934-935.

Significantly, in *Gutierrez*, the court also held that Congress has declared that a taxpayer who, like defendant . . . [Chen] . . . , has placed his or her tax return information in the custody of a professional tax preparer retains an expectation of privacy in such information. 26 U.S.C. § 7216 (2006). Under Section 7216, a tax preparer who knowingly or recklessly discloses "any information furnished to him for, or in

connection with, the preparation" of a tax return "shall be guilty of a misdemeanor," unless the disclosure is made pursuant to a court order or another statutory exception." (*Id*. at p. 935.) (footnote omitted). Thus, pursuant to 26 U.S.C. § 7216, Mr. Gu was forbidden to hand over Petitioner's tax information and records to IRS-CID agents without Petitioner's written consent, a court order or other legal process. The above-quoted authorities make it clear that the Government's implied assertion that a taxpayer who entrusts his tax information to the care of a tax preparer for purposes of complying with federal and state tax law assumes the risk that the tax preparer will voluntarily divulge the information to law enforcement is without any legal support. Based on the foregoing, Petitioner respectfully submits that both prongs of *Katz* are satisfied in this case and this Honorable Court should find that Petitioner had standing to object to the seizure of his tax information from Mr. Gu's office.

4. The Government Avoided the Restrictions of the Federal Rules of Criminal Procedure When It Obtained Information and Documents that It was Not Entitled to Obtain Under the Federal Rules of Criminal Procedure.

This is a case in which the criminal defendant played by the rules and the Government broke the rules. The result was unfair to the criminal defendant. *See* Federal Rule of Criminal Procedure 2 ("[t]hese rules are to be interpreted to provide for the

just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay"); *United States v. Haywood*, 464 F.2d 756, 760 (D.C. Cir. 1972) ("[t]he Federal Rules of Criminal Procedure are carefully tailored ground rules for fair and orderly procedures in administering criminal justice.").

The Federal Rules of Criminal Procedure govern the exchange of discovery in a criminal case. Following the rules, and specifically referencing Federal Rule of Criminal Procedure 16(b)(1)(c), on December 15, 2009, Petitioner filed his "Notice of Intent to Use Expert Testimony Regarding Compilation and Preparation of Draft Returns." In this document, Petitioner identified Mr. Gu as an expert witness he intended to call at trial. (AER 20-22.)

In response, IRS-CID Agents, who carried guns (but did not "display" them) came to Tony Gu's office with a subpoena ordering his attendance at trial, and to bring documents to trial, although no documents were described in the subpoena. (AER 43-44, 59; Supplemental Excerpt of Record ("SER") 392.) Apparently, all this was done without any prior notice to the defense. Mr. Gu felt "intimated [sic]" by the IRS-CID Agents and, rather than waiting until trial to bring documents to Court, he turned over his file to the IRS-CID Agents, who then turned that file over to the United States Attorney's Office. (AER 43.) Because the Government never made reference in any of its filings to any efforts to screen the documents it

obtained from Mr. Gu for the presence of attorney-client or work product privilege, it is fair to conclude that the United States Attorney's Office accepted the file without making any effort to separate attorney-client and work product privileged documents from non-privileged documents.

Consequently, the Government obtained documents to which it was not entitled pursuant to Federal Rule of Criminal Procedure 16. Specifically, Rule 16 states, in relevant part, as follows:

> "(2) ***Information Not Subject to Disclosure***. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
>
> (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
>
> (B) ***a statement made to the defendant, or the defendant's attorney or agent, by***:
>
> (I) ***the defendant***;
>
> (ii) a government or defense witness; or
>
> (iii) a prospective government or defense witness." (Emphasis added)

By engaging in such self-help tactics, rather than seeking discovery pursuant to Federal Rule of Criminal Procedure 16, the Government obtained many documents to which it was not entitled. At trial, not

only was Tony Gu required to testify about the content of the documents, and the contents of his meeting with counsel and Petitioner, but the documents themselves were admitted into evidence.

The privileged documents obtained through this end-run around Rule 16 were the most incriminating pieces of evidence at trial because the defense involved both lack of willfulness and lack of criminal intent. Yet, the evidence wrongfully admitted into trial bore directly on Petitioner's willfulness and intent.[4] The privileged documents included references to cash and Quick Books (which was the billing program that Mr. Chen used for his accounting).[5] (AER 115, 117-18, 178-79.)

On December 16, 2009, Tony Gu faxed to the IRS-CID agents his notes of the meeting that occurred among Petitioner, Petitioner's attorney and Mr. Gu. (AER 59, 71-72, 112.) The notes included the following notation:

> "Note Info. on QB is not complete. Wait for client bring cash sales. GGS & expenses this Friday. Client does not know how to enter cash transaction on QB)" (AER 71.)

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[4] Willfulness was an element of both 26 U.S.C. §§ 7206(1) and 7203. "Intent to defraud; that is, the intent to deceive or cheat" was an element of 18 U.S.C. § 1341. (SER 291-93.)

[5] The crux of the Government's allegations was that Mr. Chen failed to report and under-reported receipt of cash.

Such reference was incredibly incriminating because Petitioner had used Quick Books for his accounting and the notes from the meeting with Petitioner and his attorney stated that, as of that date (i.e., December 9, 2009), Petitioner did not know how to enter cash transactions on Quick Books. (AER 43, 71-72.) This statement compels the conclusion that cash receipts were not previously reported on tax returns.

The self-help method employed by the Government permitted it to get discovery that it was not entitled to receive pursuant to Rule 16. Indeed, there should be no doubt that, if the "shoe were on the other foot," and the defense wanted a copy of internal documents between an Assistant United States Attorney, and Internal Revenue Agent and a Government witness, the request would be denied and a Court would not order such disclosure.[6]

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[6] *See United States v. Nobles*, 95 S.Ct. 2160, 422 U.S. 225, 45 L. Ed. 2d 141 (1975), *on remand*, 522 F.2d 1274 (work product doctrine applies to criminal litigation as well as civil); *United States v. Mann*, 61 F.3d 326 (5th Cir. 1995), *rehearing denied*, 68 F.3d 473, *certiorari denied*, 116 S.Ct. 434, 516 U.S. 971, 133 L. Ed. 2d 349, *certiorari denied*, 116 S.Ct. 818, 516 U.S. 1094, 133 L. Ed. 2d 762, *certiorari denied*, 116 S.Ct. 923, 516 U.S. 1118, 133 L. Ed. 2d 852 ("work product privilege does apply in criminal cases" and internal government document produced by government agents in connection with investigation of case is exempt from discovery); *United States v. Robinson*, 439 F.3d 777 (8th Cir. 2006) (internal documents used by the government to calculate gross receipts, business expenses and taxes owed by defendant were immune from discovery in tax evasion

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Citing United States Supreme Court precedent, the Second Circuit Court of Appeals has noted that federal courts have supervisory power and "discretion to ensure fair proceedings" in criminal trials and "to exclude evidence taken from the defendant by willful disobedience of law." In *United States v. Hammad*, 846 F.2d 854, 860-61 (2d Cir. 1988), the Court stated as follows:

> "For half a century, the Supreme Court has recognized that 'civilized conduct of criminal trials' demands federal courts be imbued with sufficient discretion to ensure fair proceedings. *Nardone v. United States*, 308 U.S. 338, 342, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939). Thus, as Justice Frankfurter observed, '[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.' *McNabb*, 318 U.S. at 340, 63 S.Ct. at 613. Such standards constitute an exercise of the courts' supervisory authority. *McNabb*, 318 U.S. at 341, 63 S.Ct. at 613."

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prosecution as reports, memoranda, or other internal government documents made in connection with investigating or prosecuting the case); *United States v. Koskerides*, 877 F.2d 1129 (2d Cir. 1989) (materials relating to net worth computations of defendant's taxable income and computations of tax due and owing were "reports, memoranda, or other internal government documents" within meaning of criminal discovery rule and were therefore exempt from discovery).

The Ninth Circuit has also cited *McNabb* and issued rulings similar to those issued by the Second Circuit. *See United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004, *citing McNabb v. United States*, 318 U.S. 332, 340, 63 S.Ct. 608, 613 (1943) ("[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.").

In sum on this point, the district court erred when it denied Petitioner's motion to suppress because the Government broke the rules, invaded the defense camp, obtained attorney-client and work product privileged documents and used those documents, and testimony arising therefrom, against Petitioner. If the conduct of the Government is condoned, it will encourage future violations of Rule 16 by both the Government and the defense who then might engage in self-help tactics that intimidate witnesses designated in Rule 16 filings, as Mr. Gu declared occurred here. (AER 43.)

5. 26 C.F.R. § 301.7216-2 Did Not Permit Disclosure by the Accountant to the IRS.

In opposition to the Motion to Suppress, the Government attempted to rely upon 26 C.F.R. § 301.7216-2 (which relates to disclosure or use of tax return information without formal consent of taxpayer) however such provision is inapplicable to the present situation because, among other things, such

information was not used in regard to a civil audit but rather as evidence in a criminal trial.[7] (AER 120-21.)

It is clear from the comments accompanying the publication of C.F.R. 301.7216-2(b) that this section was promulgated solely for the purpose of authorizing tax preparers to "disclose to the IRS any tax return information the IRS requests to assist in the administration of electronic filing programs" and was obviously not intended to grant tax preparers plenary authority to turn over any and all tax related information provided by their clients in the absence of a court order, subpoena, summons or other provision of Title 26.

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[7] This code provision states, in applicable part, as follows:

"26 C.F.R. § 301.7216-2. Disclosure or use without formal consent of taxpayer.

(a) Disclosure pursuant to other provisions of Internal Revenue Code. The provisions of section 7216(a) and § 301.7216-1 shall not apply to any disclosure of tax return information if such disclosure is made pursuant to any other provision of the Code or the regulations thereunder. Thus, for example, the provisions of such sections do not apply to a disclosure pursuant to section 7269 to an officer or employee of the Internal Revenue Service of information concerning the estate of a decedent or a disclosure pursuant to section 7602 to an officer or employee of the Internal Revenue Service of books, papers, records, or other data which may be relevant to the liability of any person for the income tax."

In sum on this issue, while the Government "may strike hard blows, [it] is not at liberty to strike foul ones," and the obtaining and using of the records and testimony of Mr. Gu was contrary to several principles of law and, by itself, should result in reversal of the judgment. *See Berger v. United States* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L. Ed. 1314 (1935).

CONCLUSION

The petition for writ of certiorari in this case should be granted because it would permit the Supreme Court to resolve the issue as to whether use of the federal mail fraud statute to charge a violation of state law is unconstitutional. Further, the fourth amendment analysis here presents this Honorable Court with an opportunity to resolve whether a taxpayer has standing to object to the seizure of his or her tax information from a tax preparer.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL CHEN, Defendant-Appellant.	No. 13-10065 D.C. No. 3:09-cr-00149-MMC-1 MEMORANDUM* (Filed Mar. 20, 2014)

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, Senior District Judge, Presiding

Argued and Submitted March 11, 2014
San Francisco, California

Before FARRIS, REINHARDT, and TASHIMA, Circuit Judges.

Defendant Michael Chen appeals his conviction and his sentence. We affirm.

1. The district court did not err in denying Chen's suppression motion. *See United States v. Aukai,* 497 F.3d 955, 958 (9th Cir. 2007) (en banc). Chen waived any privilege by disclosing to the government

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

documents that he gave to Tony Gu. *See United States v. Richey,* 632 F.3d 559, 566 (9th Cir. 2011). Further, "[e]ven if the evidence should have been suppressed, its admission was harmless beyond a reasonable doubt because the evidence was merely cumulative." *United States v. Studley,* 783 F.2d 934, 941 (9th Cir. 1986).

2. The district court did not err in rejecting Chen's constitutional challenge to his mail fraud convictions under 18 U.S.C. § 1341. *See United States v. Navarro-Vargas,* 408 F.3d 1184, 1209 n.32 (9th Cir. 2005) (en banc). Chen's "mailing of false state tax returns constituted a violation of 18 U.S.C. § 1341," *United States v. Miller,* 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *abrogated on other grounds by Boulware v. United States,* 552 U.S. 421, 436 (2008), regardless of whether Chen "was required . . . to use the mails to submit the fraudulent tax forms," *United States v. Kellogg,* 955 F.2d 1244, 1247 (9th Cir. 1992).

3. The district court did not abuse its discretion in admitting evidence of Chen's self-reported income from Fune Ya. *See Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457, 462 (9th Cir. 2014) (en Banc). The evidence's probative value was not "substantially outweighed by its prejudicial impact," *Perry v. New Hampshire,* 132 S. Ct. 716, 729 (2012), and any risk of unfair prejudice was reduced by the district court's limiting instructions, *United States v. Cherer,* 513 F.3d 1150, 1159 (9th Cir. 2008).

4. The district court did not clearly err in calculating Chen's tax loss using U.S.S.G. § 2T1.1(c)'s presumptive rates. *See United States v. Stargell,* 738 F.3d 1018, 1024 (9th Cir. 2013). Section 2T1.1 "does not entitle a defendant to reduce the tax loss charged to him" based on unclaimed deductions, *United States v. Yip,* 592 F.3d 1035, 1041 (9th Cir. 2010), and the district court's finding that Chen failed to supply a more accurate tax loss calculation was far from clearly erroneous.

The judgment of conviction and the sentence are

AFFIRMED.