United States of America, Plaintiff, vs. Karl L. Foster a/k/a "Karl Act," Darlow T. Madge a/k/a "Skip," and Brian Madge, Defendants.

Crim. No. 97-70 (01-03) (JMR/RLE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

1997 U.S. Dist. LEXIS 17162

May 27, 1997, Decided

SUBSEQUENT HISTORY:
As Amended May 29, 1997.

COUNSEL:
For KARL L FOSTER aka "Karl Act", defendant: Richard T Oakes, Hamline Law School, St Paul, MN.

KARL L FOSTER aka "Karl Act", defendant, Pro se, Blaine, MN.

For DARLOW T MADGE, defendant: Mark A Paige, Paige Law Office, W St Paul, MN.

DARLOW T MADGE, defendant, Pro se, Mpls, MN.

For BRIAN MADGE, defendant: Dean Stuart Grau, Grau Law Office, Mpls, MN.

BRIAN MADGE, defendant, Pro se, Mpls, MN.

For U. S.: William B Michael, Jr, US Atty Office, Mpls, MN.

JUDGES:
[*1] Raymond L. Erickson, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
Raymond L. Erickson

OPINION:

ORDER and FINDINGS AND RECOMMENDATION

At Duluth, in the District of Minnesota, this 27th day of May, 1997.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title *28 U.S.C. § 636*(b)(1)(A) and (B), upon the following Motions:

1. The Motions of the Defendants Darlow T. Madge ("Darlow Madge") and Brian Madge ("Brian Madge") for Juror Questionnaires. n1

2. The Motions of Darlow and Brian Madge for Disclosure of and to Make Informant Available for Interview. n2

3. The Defendants' Motions to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant. n3

4. The Defendants' Motions for Disclosure of 404 Evidence. n4

5. The Motions of Darlow and Brian Madge for Disclosure of Grand Jury Minutes and Transcripts.

6. The Motion of Brian Madge for Discovery and Inspection of Products and Records of Electronic Surveillance. n5

7. Brian Madge's Motion to Disclose Post Conspiracy Statements of Co-Defendants. n6

8. The Motions of the **[*2]** Defendant Karl L. Foster ("Foster"), and Darlow Madge for the award of Transportation Expenses Pursuant to Title *18 U.S.C. § 4285*. n7

9. The Defendants' Motions for Jury Tax Audit Information Pursuant to Title *26 U.S.C. § 6103*(h)(5). n8

10. Darlow Madge's Motion for a Bill of Particulars on Counts II, III, IV, and V. n9

11. The Defendants' Motions to Dismiss on Jurisdictional Grounds.

12. The Defendants' Motions to Dismiss Count I for Failure to Plead Intent Element.

13. The Defendants' Motions to Suppress Evidence Obtained by Search and Seizure.

14. The Motions of Darlow and Brian Madge for Discovery and Suppression of Confessions. n10

A Hearing on the Motions was conducted on April 28, 1997, at which time Foster appeared on his own behalf, as assisted by his Standby Counsel, Richard T. Oakes, Esq.; Darlow Madge appeared on his own behalf; Brian Madge appeared on his own behalf; and the Government appeared by William B. Michael, Jr., Assistant United States Attorney. n11

n1 We construe this as, most properly, a Motion in limine for resolution by the Trial Court. Apart from asking for the issuance of a Jury Questionnaire, the Defendants have not advised of the information that they would request of the prospective Jurors and, therefore, the Motion is both substantively deficient and premature. Accordingly, we deny the Motion but without prejudice to its renewal as a Motion in limine. **[*3]**

n2 Within this Circuit, the "disclosure of a confidential informant will not be ordered unless it is vital to a fair trial." *United States v. Disbrow, 768 F.2d 976, 981 (8th Cir. 1985),* cert. denied, *474 U.S. 1023, 88 L. Ed. 2d 560, 106 S. Ct. 577 (1985);* see also, *United States v. Kime, 99 F.3d 870, 878 (8th Cir. 1996),* cert. denied, *U.S. , 117 S. Ct. 1015 (1997).* In making this assessment, the defendants bear the burden of demonstrating the need for such a disclosure, and they may satisfy that burden by establishing that an informant is a material witness or that the informant's testimony is crucial to the defense. See, *Roviaro v. United States, 353 U.S. 53, 64-65, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957).* The Government contends that the only informants, who have provided information that relates to the charges contained in the Indictment, are mere "tipsters," who provided background information, which was presented to a United States Magistrate Judge, in support of a Warrant to search the residences of Darlow and Brian Madge, and the Defendants have made no showing to the contrary. Of course, "in cases involving 'tipsters' who merely convey information to the government but neither witness nor participate in the offense, disclosure is generally not material to the outcome of the case and is therefore not required." *United States v. Harrington, 951 F.2d 876, 878 (8th Cir. 1991),* citing *United States v. Bourbon, 819 F.2d 856, 860 (8th Cir. 1987).* Accordingly, finding no "materiality" in the informants' identity, this Motion is denied. **[*4]**

n3 The Government has acknowledged its obligations under *United States v. Giglio, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963),* and their progeny, and has advised that this information either has been, or will be, produced to the Defendants. Therefore, the Motion is granted. Our grant of this Motion, however, should not be construed as accepting the Defendants' characterization of each of the categories of information, which are enumerated in their Motions, as properly constituting Brady materials. Accordingly, in generally granting these Motions, we necessarily leave the parties, in the first instance, to determine what evidence requires production, pursuant to Brady, to Giglio, or to their offspring.

n4 The Government has represented that the Rule 404(b) evidence, which comes within its possession, will be disclosed to the Defendants by no later than fifteen days before the Trial date. As a consequence, we grant these Motions, but subject to the fifteen day time constraint.

n5 The Government has represented that Brian Madge was not the subject of a wire tap, nor was he the subject of any other type of electronic surveillance. As a consequence, this Motion is denied, as moot. **[*5]**

n6 The Government advises that it has provided all post conspiracy statements of a co-Defendant to the other Defendants. Therefore, we grant this Motion.

n7 At the time of the Hearing, the Government expressed no opposition to these Motions, and we expressed the preliminary view that we would favorably consider them. In fact,

by Order dated April 9, 1997, we granted the Motion of Brian Madge for transportation expenses. Upon further reflection and research, we find that we have not made the "appropriate inquiry," as contemplated by Title *18 U.S.C. § 4285,* in order to be competently satisfied that each moving "defendant is financially unable to provide the necessary transportation to appear before the required court on his own." We, therefore, will reconsider these Motions, and we vacate our Order of April 9, 1997, as having been improvidently issued. If the moving Defendants should elect to seek the subsistence allowance, that is reflected in their respective Motions, then they should file with the Court a declaration, under penalty of perjury, which competently evidences their financial inability to make the appearances in Court, that have occurred to date. These declarations are to be filed with the Court **by no later than ten days after the date of this Order. [*6]**

n8 By Memorandum Order of April 30, 1997, we granted these Motions. See, Docket No. 135.

n9 A Bill of Particulars is intended to permit a defendant "to identify with sufficient particularity the nature of the charge pending against him, thereby enabling the defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987);* see also, *United States v. Arenal, 768 F.2d 263, 268 (8th Cir. 1985).* However, a Bill of Particulars is not intended to be a substitute for discovery, nor is it designed to provide information which the Defendant might regard as generally helpful, but which is not essential to his defense. *United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993),* cert. denied, *513 U.S. 831, 130 L. Ed. 2d 53, 115 S. Ct. 105 (1994),* citing *United States v. Hester, 917 F.2d 1083, 1084 (8th Cir. 1990).*

In demanding a Bill of Particulars, Darlow Madge relies upon an incidental observation, in *Sansone v. United States, 380 U.S. 343, 354, 13 L. Ed. 2d 882, 85 S. Ct. 1004 (1965),* that Section 7201 includes "the offense of willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax." Arguing that Section 7201 proscribes the separate and distinct crimes of evasion, both as to the assessment of a tax and as to the payment of a tax, Madge contends that the Indictment, in Counts 2 through 5, is duplicitous because it charges him with both crimes. As a consequence, he urges the Government to elect between the two offenses alleged. We find no merit to Madge's argument. Every Circuit, which has addressed this same contention, has rejected it. See, *United States v. Pollen, 978 F.2d 78, 87 n. 16 (3rd Cir. 1992),* cert. denied, *508 U.S. 906, 124 L. Ed. 2d 244, 113 S. Ct. 2332 (1993); United States v. Becker, 965 F.2d 383, 386 (7th Cir. 1992),* cert. denied, *507 U.S. 971, 122 L. Ed. 2d 783, 113 S. Ct. 1411 (1993); United States v. Huguenin, 950 F.2d 23, 26 (1st Cir. 1991); United States v. Mal, 942 F.2d 682, 686 (9th Cir. 1991); United States v. Masat, 896 F.2d 88, 91 (5th Cir. 1990).*

Although our Court of Appeals has not directly addressed the issue, we note that the Court has relied upon the Court's analysis, in *United States v. Mal, supra,* to conclude that an unrelated statute, which defined a single crime, did not present an issue of duplicity, where the Counts of the Indictment conjunctively charged different means of committing that crime, which the operative statute had denounced disjunctively. See, *United States v. Street, 66 F.3d 969, 974 (8th Cir. 1995);* see also, *United States v. Mal, supra at 688.* We are satisfied that, if confronted with this issue, our Court of Appeals would follow the reasoning of its sister Circuits, and would hold that Section 7201 proscribes the single crime of tax evasion, which can be committed either by evading the assessment, or by evading the payment of income taxes. Accordingly, there is no duplicity here, and we find no need for a Bill of Particulars. We, therefore, deny this Motion. **[*7]**

n10 The Government advises that it does not intend to offer at Trial any statements from Darlow and Brian Madge in the nature of confessions. Accordingly, these Motions should be denied as moot.

n11 Following the close of the Hearing, the Defendants have continued to file Motions for our consideration, the last of which was filed on May 14, 1997, and precipitated a series of Government responses, the last of which was filed on May 22, 1997. As a consequence, the matter was taken under advisement after the submission of the last filing. See, Title *18 U.S.C. § 3161*(h)(1)(F) and (J); *Henderson v. United States, 476 U.S. 321, 330-32, 90 L. Ed. 2d 299, 106 S. Ct. 1871 (1986); United States v. Blankenship, 67 F.3d 673, 676-77 (8th Cir.*

1995). Although the Government has opposed the filing of any pro se Motions, and has challenged the Defendants' post-Hearing Motions as being untimely, in the interests of completeness, we deny the Government's Motions to Strike the belated submissions of the Defendants.

As to those Motions which remain for resolution, we recommend the denial of the **[*8]** Defendants' challenges to the Court's jurisdiction, the denial of the Defendants' Motions to Dismiss, and the denial of their Motions to Suppress the Evidence Obtained by Search and Seizure.

II. Findings of Fact

In an Indictment that was filed on February 20, 1997, the Defendants were charged with one Count of conspiring to defraud the United States, by obstructing and impeding the due administration of the Internal Revenue Code, in violation of Title *18 U.S.C. § 371.* In addition, Darlow Madge has been charged with four Counts of tax evasion, in violation of Title *26 U.S.C. § 7201;* Brian Madge has been charged with two Counts of filing a false tax return, in violation of Title *18 U.S.C. § 7206*(1); and Foster is charged with one Count of aiding in the filing of a false tax return, in violation of Title *18 U.S.C. § 7206*(2), and with three Counts of attempting to interfere with the administration of the Internal Revenue laws, in violation of Title *18 U.S.C. § 7212*(a). As pertinent to the Motions before us, the facts may be briefly summarized. n12

n12 Rule 12(e), Federal Rules of Criminal Procedure, provides that, "where factual issues are involved in determining a motion, the court shall state its essential factual findings on the record." As augmented by our recitation of factual findings in the course of our "Discussion," the essential factual findings, that are required by the Recommendations we make, are contained in this segment of our Opinion. Of course, these factual findings are preliminary in nature, are confined solely to the Motions before the Court, and are subject to such future modification as the subsequent development of the facts and law may require. *United States v. Moore, 936 F.2d 287, 288-89 (6th Cir. 1991),* cert. denied, *505 U.S. 1228, 120 L. Ed. 2d 918, 112 S. Ct. 3052 (1992); United States v. Prieto-Villa, 910 F.2d 601, 610 (9th Cir. 1990).*

[*9]

On March 8, 1994, Warrants were issued, by United States Magistrate Judge J. Earl Cudd, for a search of the separate residences of Darlow and Brian Madge. In support of these Warrants, Darryl K. Williams ("Williams"), who is a Special Agent with the Internal Revenue Service ("IRS"), averred that IRS records revealed that Darlow Madge had last filed a Federal income tax return for the year ending December 31, 1986, while Brian Madge had last filed a return for the year ending December 31, 1991. As a result of information, that was obtained through administrative summonses, the Application for a Warrant related that Darlow Madge had control over bank accounts -- in four different banks -- and that the total deposits to these accounts, during the years 1987, 1988, 1989, 1990, 1991, and 1992, were in the amounts of $ 422,678, $ 489,420, $ 565,415, $ 590,052, $ 505,239, and $ 651,281, respectively.

An administrative summons was also used to secure a loan application, which was prepared, under penalty of perjury, on August 22, 1989, in conjunction with Darlow Madge's purchase of a personal residence having a sales price of $ 314,326. On that application, Darlow Madge listed his gross monthly **[*10]** income at $ 15,000 per month; his net worth, as of September 27, 1989, as $ 203,771; his inventory of three automobiles was appraised at an approximate value of $ 43,000; and his loan payments, on a mortgage of approximately $ 230,000 -- some $ 86,091 to be paid at the time of closing in cash -- were listed as $ 2,103.90 per month, for a period of 360 months. The Application also recounted a number of transactions by which Darlow Madge had transferred personal assets to trusts which were under his control, or under the joint control of himself and his son, Brian. According to information secured from confidential informants, Darlow Madge had stated that "none of his assets are in his name," that, "because of the trusts that he has set up, the IRS can't get any of his assets," and that Darlow Madge has expressed the view that "he does not pay taxes because the tax laws do not apply to him because the IRS does not have taxing authority nor jurisdiction over the tax laws."

The Warrant Application also related that information had been secured concerning Darlow Madge's application to lease a 1992 Nissan Pathfinder. In that credit application, Darlow Madge listed his monthly income as **[*11]** ranging from $ 6,000 to $ 8,000. A credit application was also secured which pertained to Brian Madge's lease of a 1993 Mazda. In that application, which was signed on March 3, 1993, Brian Madge listed his gross monthly salary as $ 4,000 -- $ 2,000 being derived from a monthly salary, and $ 2,000 arising from a "mail order business." Given the disparity of the Madges' self-reported income, as disclosed in their

credit applications, and the absence of income tax filings during the same period of time, the Application expressed the opinion, of an experienced IRS Agent, that Darlow Madge was "engaged in a pattern of conduct designed to conceal his income and assets from the government," and that evidence of such unlawful activities would be found in Darlow Madge's residence. Similarly, the IRS Agent, who applied for the Warrant to search Brian Madge's home, attested to his opinion, that the residence would disclose evidence that the Federal tax laws had been violated, and that Darlow and Brian Madge were engaged in a conspiracy to defraud the Government in violation of Title *18 U.S.C. § 371*. Based upon these showings, the Magistrate Judge issued a Warrant to search the residences of **[*12]** each of the Madges, and each of the Warrants was executed on March 9, 1994.

In addition, on May 24, 1995, Dennis R. Malchow ("Malchow"), who is a Special Agent with the IRS, approached United States Magistrate Judge Jonathan G. Lebedoff with an Application for a Warrant to search the residence of Foster. In that Application, Malchow averred that a search of IRS records disclosed that Foster had not filed an income tax return since 1983. Along with averments that Foster was implicated in the preparation of various trusts, which were designed to frustrate the Government's ability to enforce the Federal tax laws, Malchow's Affidavit, in support of a Search Warrant, recounted the actions of an undercover IRS Agent, who secured Foster's assistance in the creation of such a trust, in the latter part of March, 1995. In exchange for these services, Foster accepted the sum of $ 500, apparently as an installment on a total bill for services of $ 1,500.

As related in Malchow's Affidavit:

The UCA [i.e., undercover agent] asked Foster how long had he been doing Foreign Situs Trusts. Foster replied, "a couple years". The UCA asked Foster how many Foreign Situs Trusts he had done. Foster **[*13]** replied, "40 or 50, something like that" mostly in the last two years, when people became receptive to the idea. In response to the UCA's question as to how much money Foster has saved for these people, Foster replied, on the average, $ 15,000 to $ 20,000. Foster and the UCA agreed that the people have saved $ 600,000 a year, or $ 1,200,000 in two years.
***
Foster and the UCA agreed on a price of $ 1,500 for each trust. Foster quoted the total price of $ 5,500 for the two trust and the UNTAXING. Foster explained that the $ 2,500 was for when the "shit start bombing you and all the paperwork starts coming in and the tax thing we be buried up to our asses." I believe that Foster's fee of $ 5,500 includes $ 3000 for the trusts and $ 2,500 for an ongoing aiding/assisting relationship.

The Warrant to search Foster's residence was issued on May 24, 1995, and was executed May 25, 1995. Although Foster did not believe that the Warrant, which he received at the time of the search, included a listing of the items to be seized, Malchow testified that he believed that the listing was presented to Foster, during the course of the search, because Malchow and Foster discussed the **[*14]** most efficient way of completing the search, given the voluminous files and paperwork that were uncovered in Foster's residence. According to Malchow, and there is no controverting evidence, after discussing the alternatives of reviewing and cataloging Foster's papers at his residence, or of removing those materials in order that they might be inventoried without inconveniencing either Foster or his family members, Foster consented to the wholesale removal of his papers from his house.

Each of the Defendants contests the existence of probable cause for the respective searches of their residences, and each contends that the Warrants for those searches were constitutionally overbroad. n13 In addition, the Defendants join in a variety of arguments for the dismissal of the Indictment on jurisdictional and other grounds.

n13 Initially, Darlow Madge filed no Motion to Suppress the evidence that had been obtained by search and seizure, and Brian Madge was, at best, equivocal as to whether he intended to adopt the Motion to Suppress that was filed on his behalf, when he was represented by legal counsel. On May 12, 1997, however, the Defendants Madge filed a joint Motion to Suppress. While woefully untimely, and notwithstanding the absence of any cause for the significant delay in the Motion's filing, the issues raised parallel those of Foster and, therefore, in the interests of completeness, we address the contentions of the Defendants Madge.

[*15]

III. Discussion

A. The Motions of Darlow and Brian Madge for Disclosure of Grand Jury Minutes and Transcripts.

1. Standard of Review. The disclosure of Grand Jury minutes is encompassed within Rule 6(e)(3)(C)(ii), Federal Rules of Criminal Procedure. The Rule provides that a disclosure of Grand Jury materials may be made "when permitted by a court at the request of the

defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." To secure Grand Jury materials, however, the Defendant must show a "particularized need" for the information. See, *United States v. Broyles, 37 F.3d 1314, 1319 (8th Cir. 1994),* cert. denied, *U.S. , 115 S. Ct. 1441, 131 L. Ed. 2d 320 (1995); United States v. Warren, 16 F.3d 247, 253 (8th Cir. 1994).* A "particularized need" is demonstrated by the presentation of "specific evidence of prosecutorial over-reaching." *United States v. Lame, 716 F.2d 515, 518 (1983).* As a consequence, a defendant who "has not pointed to anything in the record which might suggest that the prosecution has engaged in improper conduct before the grand jury" **[*16]** has failed to carry his burden. Id., quoting *United States v. Edelson, 581 F.2d 1290, 1291 (7th Cir. 1978),* cert. denied, *440 U.S. 908, 59 L. Ed. 2d 456, 99 S. Ct. 1216 (1979).*

2. Legal Analysis. Here, the Madges assert that the Grand Jury was presented with hearsay evidence, and that the Government may have deprived the Grand Jury of certain exculpatory evidence which could demonstrate a lack of intent, on the Madges' part, to commit one or more of the offenses of which they are accused. However, in *Costello v. United States, 350 U.S. 359, 363, 100 L. Ed. 397, 76 S. Ct. 406 (1956),* the Supreme Court declined to enforce the hearsay rule in Grand Jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." Later, in *United States v. Williams, 504 U.S. 36, 51, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992),* the Court rejected the remaining portions of the argument, that the Madges advance here, as follows:

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is an adequate basis for bring-in a criminal **[*17]** charge. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side.

Simply put, a suspect before the Grand Jury has no right to testify, or to have exculpatory evidence presented for the Jury's consideration. Id.; *United States v. Finn, 919 F. Supp. 1305, 1327 (D. Minn. 1995)*(A defendant "may not challenge an Indictment on the ground that evidence favorable to a defendant had not been presented to the Grand Jury.").

Most recently, on May 14, 1997, the Madges filed another Motion which expresses uncertainty as to whether the strictures of Rule 6, Federal Rules of Criminal Procedure, were followed, particularly as to the qualifications of the Jurors, and as to the sufficiency of votes cast in favor of returning an Indictment. Nevertheless, we have no reason to believe that less than twelve Jurors concurred in the Indictment against these Defendants, or that the Indictment was not returned in open court, nor do the Madges make any particularized showing to the contrary. See, Rule 16(f), Federal Rules of Criminal Procedure.

Moreover, to the extent that their most recent Motion questions the constitutionality **[*18]** of Rule 6(d), which authorizes a government attorney to be present while the Grand Jury is in session, we find the Motion to be infirmly founded. The Madges contend that, in English law, prosecuting attorneys were not allowed to attend the Grand Jury's proceedings, and that the current practice of allowing such attendance has resulted in widespread prosecutorial misconduct. Notwithstanding their suggestion, that Rule 6(d) was promulgated to overrule the Court's holding in *United States v. Rosenthal, 121 F. 862 (S.D.N.Y. 1903),* the Madges fail to account for the fact that, in Rosenthal, the Court recognized, and accepted the long established custom of permitting government attorneys to attend Grand Jury proceedings. *Id. at 871* (Court favorably quotes *United States v. Edgerton, 80 F. 374, 375 (D. Mont. 1897)* for the proposition that: "It is beyond question that no persons, other than a witness undergoing examination, and the attorneys for the government, can be present during the sessions of the grand jury."). Indeed, the issue in Rosenthal was whether an allowance of attorneys from the Department of Justice to attend Grand Jury sessions would be "in derogation of **[*19]** the exclusive power of the District Attorney [i.e., the United States Attorney] to initiate proceedings before the grand jury." See, e.g., *United States v. Wrigley, 520 F.2d 362, 366 (8th Cir. 1975),* cert. denied, *423 U.S. 987, 46 L. Ed. 2d 304, 96 S. Ct. 396 (1975).* Accordingly, we are not persuaded, as the Madges portend, that the procedures mandated by Rule 6(d), constitutionally contravene those in existence at the time of our Constitution's adoption. n14

n14 In *Hale v. Henkel, 201 U.S. 43, 60, 50 L. Ed. 652, 26 S. Ct. 370 (1906),* the Supreme Court noted the existence of differences, between the practices of the Grand Jury in England and those on this continent, and expressly recognized the acceptance of the prosecution of Indictments by governmental attorneys, as follows:

Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of prosecutions carried on by officers of the state appointed for that

purpose, has been entirely settled since the adoption of the Constitution.

Although the Madges have referenced " *Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 373, 50 L. Ed. 652 (1905),*" see page 8 of 35, Memorandum of Law in Support of Motion for Clarification, they have not addressed this aspect of the Court's opinion.

[*20]

As recently as 1992, the Supreme Court has reconfirmed the authority of Congress, and of the Courts, to prescribe procedures for the conduct of Grand Jury proceedings. In *United States v. Williams, supra at 46,* the Court characterized Rule 6 as one of the "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." Quoting, *United States v. Mechanik, 475 U.S. 66, 74, 89 L. Ed. 2d 50, 106 S. Ct. 938 (1986)*(O'Connor, J. concurring). More importantly, the Supreme Court expressly recognized the authority of Congress to prescribe different procedures for the Grand Jury, should they prove to be worthy, and the dissenting justices, in Williams, took no exception to that proposition. *United States v. Williams, supra at 55* (accepting that, if a particular Grand Jury procedure "will save valuable judicial time," then "Congress is free to prescribe it") and 67 n. 10 (Stevens, J. dissenting)("even the Court acknowledges that Congress has the power to regulate the grand jury"). We accept, as the Court did in Williams, that "the authority of the prosecutor to seek an indictment has long been **[*21]** understood to be 'coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." *Id. at 53,* quoting *United States v. Thompson, 251 U.S. 407, 414, 64 L. Ed. 333, 40 S. Ct. 289 (1920).* Therefore, finding no basis upon which to conclude that Rule 6(d) is unconstitutional, we find no basis to conclude that prosecutorial misconduct occurred during the Grand Jury sessions, and deny the request that the minutes and transcripts of those sessions be disclosed. n15

n15 Although denominated as a Motion for Clarification, to take Judicial Notice, and to Dismiss Indictment, the plain focus of this most recent Motion is to dismiss the Indictment against the Madges as being premised upon an unconstitutional engagement of the Grand Jury. For reasons already addressed in the text of this opinion, we recommend that the Motion to Dismiss, on these grounds, be denied as without merit.

Lastly, we note that, if a witness at Trial has previously provided testimony to the Grand Jury, then the Defendants **[*22]** may well be entitled to that testimony on independent grounds -- namely, Brady or the Jencks Act. At this time, however, there is no showing that any such witness will be called at Trial and, therefore, we deny these Motions but without prejudice to their renewal at a later date.

B. The Motions to Dismiss on Various Jurisdictional Grounds.

In moving to dismiss their Indictment on jurisdictional grounds, the Defendants invoke the weary mantra of the tax protest movement. n16 Reduced to their essentials, the Defendants present the following contentions:

1. That the Court lacks subject matter jurisdiction over the charges against the Defendants, lacks personal jurisdiction over the Defendants, and the action has been improperly venued;

2. That payment of the Federal income tax is voluntary and, therefore, the failure to pay such a tax cannot constitute a criminal offense;

3. That, in the absence of implementing regulations, the Federal tax statutes are unenforceable;

4. That they are entitled to an administrative Hearing to challenge the IRS' jurisdiction; and,

5. That Paperwork Reduction Act, as it relates to the provision of Office of Management **[*23]** and Budget form numbers, precludes the charges against the Defendants.

We address each of these contentions, in turn. n17

n16 Due to their repetitive, and overlapping arguments, we jointly consider, in this segment of our Findings and Recommendation, the following Motions and papers: Foster's Motion to Dismiss All Counts; Darlow Madge's Notice Re: Challenge of Jurisdiction Claimed by Government to Prosecute; Darlow Madge's Motion to Dismiss, I.R.S. Jurisdiction Founded on Fraud; Darlow Madge's Notice of Request for Declaratory Judgment; Darlow Madge's Show of I.M.F. and AMDISA Relevance; Brian Madge's Motion to Dismiss Indictment; Brian Madge's Motion to Dismiss Counts VI and VII for Failure

to Establish a Tax Liability and Mistake of Law; Brian Madge's Response to Government's Response on Motion to Dismiss Counts VI and VII; Brian Madge's Motion to Add Exhibits on Motion to Dismiss Counts VI and VII, and Darlow and Brian Madge's Motion for Clarification, for Judicial Notice, and to Dismiss Indictment. Accordingly, to the extent that the Defendants have filed Motions to Join in the jurisdictional Motions of a Co-Defendant, the Motions are granted. **[*24]**

n17 In addition to their Motions, each of the Defendants has served upon the undersigned a document that they have denominated as a "NOTICE CAVEAT DEMAND CONSTRUCTIVE CAVEAT NOTICE." Whatever may be its purpose, the best that can be said of its contents is that it constitutes an astonishing amalgam of misinformation. See, *United States v. Drefke, 707 F.2d 978, 984 (8th Cir. 1983),* cert. denied sub nom. *Jameson v. United States, 464 U.S. 942, 78 L. Ed. 2d 321, 104 S. Ct. 359 (1983).*

1. The Defendants' Jurisdictional Arguments.

"Although it is true federal courts are courts of limited jurisdiction, *18 U.S.C. § 3231* provides that district courts "have original jurisdiction *** of all offenses against the laws of the United States," including offenses, as charged here, under Title 26 of the United States Code. *United States v. Spurgeon, 671 F.2d 1198, 1199 (8th Cir. 1982);* see also, *United States v. Watson, 1 F.3d 733, 734 (8th Cir. 1992); United States v. Rosnow, 977 F.2d 399, 412-13 (8th Cir. 1992),* cert. denied sub. nom. *Dewey v. United States, 507 U.S. 990, 123* **[*25]** *L. Ed. 2d 159, 113 S. Ct. 1596 (1993); United States v. Schmitt, 784 F.2d 880, 882 (8th Cir. 1986); United States v. Drefke, 707 F.2d 978, 981 (8th Cir. 1983),* cert. denied sub nom. *Jameson v. United States, 464 U.S. 942, 78 L. Ed. 2d 321, 104 S. Ct. 359 (1983); United States v. Marks, 691 F.2d 428, 429 n. 2 (8th Cir. 1982).* As our Court of Appeals explained, in *United States v. Drefke, supra at 981:*

Section 3231 grants federal courts jurisdiction over "all offenses against the laws of the United States" * * *. Article I, Section 8 of the Constitution and the Sixteenth Amendment empower Congress to create and enforce an income tax. Pursuant to that power, Congress made federal crimes of certain actions aimed at avoiding payment of income tax. See *26 U.S.C. § § 7201*-7210. The district court, then, clearly had jurisdiction under *18 U.S.C. § 3231* to try the appellants for the offenses of failure to file income tax returns and filing false withholding exemption certificates.
[Emphasis in original].

Moreover, given the Defendants' residence in the State of Minnesota, the Federal Courts of this District have personal jurisdiction over each of **[*26]** them. We find the Defendants' assertion, that they are citizens of the "Sovereign Republic County Minnesota State," and that the "United States consists of ten square miles, a/k/a District of Columbia, its territories, insular possessions and enclaves located within the boarders [sic] of anyone [sic] of the fifty Sovereign Republic Countries/States belonging to the Union of these united States of America," to be patently frivolous under the settled law of this Circuit. See, *United States v. Watson, supra at 734* (rejecting similar claim); *United States v. Gerads, 999 F.2d 1255, 1256-57 (8th Cir. 1993),* cert. denied, *510 U.S. 1193, 127 L. Ed. 2d 652, 114 S. Ct. 1300 (1994); United States v. Sileven, 985 F.2d 962, 970 (8th Cir. 1993); United States v. Jagim, 978 F.2d 1032, 1036 (8th Cir. 1992),* cert. denied sub nom. *Ziebarth v. United States, 508 U.S. 952, 124 L. Ed. 2d 664, 113 S. Ct. 2447 (1993); United States v. Schmitt, supra at 882.* As expressed by our Court of Appeals:

We reject [tax protectors'] contention that they are not citizens of the United States, but rather "Free Citizens of the Republic of Minnesota" and, consequently, not subject **[*27]** to taxation. See *United States v. Kruger, 923 F.2d 587, 88* (8th cir. 1991)(rejecting similar argument as "absurd").
United States v. Gerads, supra at 1256.

Lastly, the well-settled rule is that "the Internal Revenue Code requires personal returns to be filed in the district of one's legal residence or at an IRS service center for that district, *26 U.S.C. § 6091*(b)(1)(A)(i) & (ii)(1976), and federal law requires that a criminal prosecution must be brought at least initially in a district in which the offense was committed." *United States v. Grabinski, 727 F.2d 681, 684 (8th Cir. 1984);* see also, *United States v. Clines, 958 F.2d 578, 583 (4th Cir. 1992)*("The crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns."), cert. denied, *505 U.S. 1205, 120 L. Ed. 2d 871, 112 S. Ct. 2994(1992); United States v. Dawes, 874 F.2d 746, 750 (10th Cir. 1989)*("Venue is proper in the district of taxpayers' residence."), cert. denied, *493 U.S. 920, 107 L. Ed. 2d 264, 110 S. Ct. 284 (1989).*

Accordingly, we find no jurisdictional defects, nor any basis upon which to dismiss the Indictment against the Defendants **[*28]** on jurisdictional grounds, and we recommend a denial of these Motions.

2. The Motions to Dismiss on the Ground that the Income Tax is a Voluntary Tax.

The Defendants argue that the failure to file, or to pay, Federal Income taxes is not a chargeable offense, since the tax is a voluntary imposition. Indeed, Darlow Madge has gone so far as to pledge, on several occasions, his entry of a plea of guilty if anyone can identify a provision in the Federal tax statutes which obligates a person to pay an income tax. Others have made, quite to their subsequent chagrin, the same challenge.

In *Newman v. Schiff, 778 F.2d 460, 461 (8th Cir. 1985),* "Newman claimed that Schiff had made a public offer of reward to anyone who could cite any section of the Internal Revenue Code that says an individual is required to file an income tax return." "Schiff's basic contention [was] that the federal income tax [was] a voluntary tax which no one [was] required to pay." Id. The public offer was made on a live broadcast, while Newman responded to that offer, by citing pertinent sections of the Internal Revenue Code, after hearing a rebroadcast of the proposition. After Schiff refused to pay **[*29]** the reward, Newman sued him, in District Court, for the breach of an oral contract. The District Court decided that Newman's response was untimely and, therefore, Schiff was not obligated to pay on the pledge made. However, the District Court went on to characterize "Schiff's argument that there is no requirement for individuals to file a tax return [as] 'blatant' nonsense." *Id. at 463.* On appeal, our Court of Appeals affirmed the District Court's procedural decision, but went on to observe:

> Schiff's claim that there is nothing in the Internal Revenue Code that requires an individual to file a federal income tax return demands comment. The kindest thing that can be said about Schiff's promotion of this idea is that he is grossly mistaken or a mere pretender to knowledge in income taxation. We have nothing but praise for Mr. Newman's efforts which have helped bring this to light.
>
> *Section 6012 of the Internal Revenue Code* is entitled "Persons required to make returns of income," and provides that individuals having a gross income in excess of a certain amount "shall" file tax returns for the taxable year. *26 U.S.C. § 6012.* Thus, section 6012 requires certain individuals **[*30]** to file tax returns. *United States v. Drefke, 707 F.2d 978, 981* (8th Cir.), cert. denied, *464 U.S. 942* *** (1983).
> ***
> Although Newman has not "won" his lawsuit in the traditional sense of recovering a reward that he sought, he has accomplished an important goal in the public interest of unmasking the "blatant nonsense" dispensed by Schiff.
> Id. at 467.

Although, in a strict sense, the Court's observation was dicta, the Court's citation to *United States v. Drefke, supra,* is instructive. There, the Court expressly rejected the same argument that the Defendants have raised here, and concluded that, as a matter of law, the Federal income tax is not voluntarily incurred. In the words of the Court:

> *26 U.S.C. § 6151* states that when a tax return is required to be filed, the person so required "shall" pay such taxes to the internal revenue officer with whom the return is filed at the fixed time and place. The sections of the Internal Revenue Code imposed a duty on [the defendant] to file tax returns and pay the appropriate rate of income tax, a duty which he chose to ignore.
> *United States v. Drefke, supra at 981* [emphasis in original].

Since **[*31]** the issue was first raised within this Circuit, the law has been consistently applied and, therefore, the Defendants' "claim that payment of federal income tax is voluntary clearly lacks substance." *United States v. Gerads, supra at 1256;* see also, *May v. C.I.R., 752 F.2d 1301, 1304 (8th Cir. 1985)*("Tax protest cases like this one raise no genuine controversy; the underlying legal issues" -- including the claim that the filing of an income tax return is "voluntary" -- "have long been settled."); *United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983).*

Notwithstanding the Defendants' contention, that we should ignore, or reject, the controlling legal precedent within this Circuit, to do so would be to abdicate our responsibility to enforce the governing law. Here, the Defendants do not cite any authority to support the proposition that the income tax is voluntary, and they overlook the wealth of authority to the contrary. This we may not do, n18 and we recommend the rejection of these arguments.

> n18 We do not overlook the Defendants' vague arguments that the Federal income tax is an unlawful excise, and that the reach of the tax impermissibly encompasses activities which, in their view, are not taxable. Nevertheless, the arguments are so abjectly without merit, that they do not warrant any further discussion. See, *United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993)*("We have rejected, on numerous occasions, the tax-protestor argument that the federal income tax is an unconstitutional direct

tax that must be apportioned."), cert. denied, *510 U.S. 1193, 127 L. Ed. 2d 652, 114 S. Ct. 1300 (1994); United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983)*("Although the sixteenth amendment, giving Congress the power to tax income, does not define 'income,' the courts have interpreted the term in its every day usage to mean gain derived from capital, from labor or from both combined.").

[*32]

3. The Defendants' Motion to Dismiss Since the Federal Tax Statutes have no Implementing Regulations.

The Defendants raise the oft-repeated argument that they do "not owe Federal individual income taxes because the Internal Revenue Service has failed to identify any agency regulation which entitles the IRS to impose a tax upon him." *United States v. Langert, 902 F. Supp. 999, 1002 (D. Minn. 1995).* The Courts which have considered the argument have found it to be without merit, because the Internal Revenue Code "fully defines the criminal conduct it prohibits and therefore does not contemplate that regulations will be promulgated to define further substantive obligations beyond those created by the Code." *United States v. Washington, 947 F. Supp. 87, 91 (S.D.N.Y. 1996),* citing *United States v. Hicks, 947 F.2d 1356, 1360 (9th Cir. 1991)*("It is the tax code itself, without reference to regulations, that imposes the duty to file a tax return."); *United States v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990)*("However, the [defendants] simply have evaded income taxes, and their duty to pay those taxes is manifest on the face of the statutes, without any resort to IRS **[*33]** rules, forms, or regulations.").

In this District, the issue was thoroughly addressed in *United States v. Langert, supra at 1002,* where the Court recognized that Title *26 U.S.C. § 7805*(a) broadly authorizes the Commissioner of the Internal Revenue Service to prescribe all "needful" rules and regulations for the enforcement of the Internal Revenue Code, and to promulgate, as necessary, any interpretive regulations. There, however, as here, the defendants "failed to identify any ambiguity in any section of the Code pertaining to individual income tax which requires the promulgation of interpretive regulations." *Id. at 1003,* citing Title *26 U.S.C. § § 1,* 6012, 6013, 6071(a), 6072(a), 6151(a); see also, *United States v. Rosnow, supra at 413* ("Nor do we find merit in [the defendant's arguments that *** he was denied prior notice of the illegality of his actions since the IRS has not published administrative regulations pertaining to the crimes involved in this case."). Rather, the Defendants have ignored the clear import of the Code, as it statutorily requires them, in clearly unmistakable terms, to file accurate, individual income tax returns. Accordingly, we also recommend **[*34]** the rejection of this aspect of the Defendants' challenge to their Indictment.

4. The Defendants Motion to Dismiss or to Provide Them With an Administrative Hearing to Challenge the IRS' Jurisdiction.

Varyingly phrased, the Defendants have requested an Evidentiary Hearing in order to challenge the propriety of the IRS' computerized data which relates to their purported liability for Federal income taxes. Of course, "the Internal Revenue Code nowhere grants individuals who are under criminal investigation the right to a hearing to challenge the Service's jurisdiction over them." *United States v. Drefke, supra at 981.* Stated otherwise, "the filing of an administrative assessment record is not required before a criminal prosecution may be instituted under *26 U.S.C. § § 7201*-07 (1976) for failure to report or pay income tax." *United States v. Richards, supra at 648.*

Nevertheless, relying upon the Court's decision in *United States v. Buford, 889 F.2d 1406 (5th Cir. 1989),* the Defendants contend that their Indictment is undermined by their interpretation of the encryptions on those of their computer records -- denominated as "AMDISAs" -- which have been produced. According **[*35]** to Darlow Madge, his AMDISA includes an entry reflecting that his "revenue taxable activity" relates to "Policies Issued by Foreign Insurers," and that, as he interprets the computerized codes, a return was not required of him. Whatever may be said for the enigmatic hieroglyphics that the Defendants have referenced from Darlow Madge's AMDISA, their reliance upon Buford is misplaced. In Buford, the Government refused to produce the computerized records of a defendant, asserting that the documents were not subject to production under either Rule 16, Federal Rules of Criminal Procedure, or under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).* Nevertheless, at the trial of that defendant, the issue was contested as to whether he had filed income tax returns -- the Government denied a filing, but the defendant claimed that returns had been duly filed. To prove its case, the Government produced a witness who, by relying on the IRS' computerized records, testified that the defendant had filed no return, notwithstanding that the records, which undergirded that testimony, had never been produced.

Here, however, neither Foster nor Darlow Madge make any suggestion **[*36]** that they filed a Federal income tax return for the years charged in their Indictment and, indeed, they are adamant that such returns were not required. As for Brian Madge, although

he filed returns -- which the Government contends were knowingly false -- he has since repudiated the intent and the actuality of those filings. As a result, contrary to the circumstances present in Buford, such computerized information as the IRS maintains, for any of the Defendants, has been produced and will be available to them if they wish to contest, at Trial, their liability for Federal income taxes. See, *United States v. Pottorf, 769 F. Supp. 1176, 1181 and n. 2 (D. Kan. 1991); United States v. Pottorf, 828 F. Supp. 1489, 1495 (D. Kan. 1993);* cf., *United States v. Huebner, 48 F.3d 376, 383 (9th Cir. 1994),* cert. denied, *U.S. , 116 S. Ct. 71 (1995).*

We emphasize, however -- as we did at the Hearing -- that the predicate acts for the charges against the Defendants are their asserted failures to report and pay, or to accurately report and pay, income which is subject to Federal taxation. How the Government intends to prove those charges is irrelevant to our analysis **[*37]** at this preliminary juncture, as the Defendants will have a full opportunity to draw to the Jury's attention all relevant evidence which will demonstrate that they reported, and paid, all of their income that the law requires. As we also explained at the Hearing on this Motion, the Defendants' request for an administrative, or Evidentiary Hearing, on the accuracy of the IRS' computerized records, unavoidably implicates a "trial of the general issue," which we are not empowered to entertain in the context of a Rule 12 Motion. See, Rule 12(b) Federal Rules of Criminal Procedure. Accordingly, we deny the request for an Evidentiary Hearing, as well as Darlow Madge's concomitant Motion to waive the Speedy Trial Act in order that such a Hearing may be conducted, and we recommend the rejection of any Motion to Dismiss that has been premised upon these grounds.

5. The Defendants' Assertion that their Indictment Should be Dismissed Because of the IRS' Asserted Failure to Comply with the Paper Work Reduction Act.

The Defendants urge that the Paperwork Reduction Act of 1980, Title *44 U.S.C. § 3501* et seq. ["PRA"], bars their prosecution. In pertinent part, the PRA provides as **[*38]** follows:

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved *** does not display a current control number assigned by the [Office of Management and Budget (OMB) Director * * *.

The Defendants contend that they may not be punished, for the charges alleged in their Indictment, since the 1040 Forms, which the IRS has provided for individual income tax reporting, do not contain accurate OMB numbers. We are not so persuaded.

For these purposes, we accept, without deciding, that the pertinent 1040 Forms bore an inaccurate OMB number. Notwithstanding that concession, every Court, which has confronted this same argument, has rejected the result that the Defendants urge, because the PRA regulates the actions of administrative agencies, and does not purport to constrain the actions of Congress. As explained by the Court, in *United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991):*

The legislative history of the PRA and its structure as a whole lead us to conclude that it was aimed at reining in agency activity. See **[*39]** S.Rep. No. 930, 96th Cong.2d Sess., reprinted in 1980 U.S.C.C.A.N. 6241 (legislative history of PRA). Where an agency fails to follow the PRA in regard to an information collection request that the agency promulgates via regulation, at its own discretion, and without express prior mandate from Congress, a citizen may indeed escape penalties for failing to comply with the agency's request. See, e.g., *United States v. Hatch, 919 F.2d 1394 (9th Cir. 1990); United States v. Smith, 866 F.2d 1092 (9th Cir. 1989).* But where Congress sets forth an explicit statutory requirement that the citizen provide information, and provides statutory criminal penalties for failure to comply with the request, that is another matter. This is a legislative command, not an administrative request. The PRA was not meant to provide criminals with an all-purpose escape hatch. See *United States v. Burdett, 768 F. Supp. 409 (E.D.N.Y. 1991);* see also *United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990)*("Defendant was not convicted of violating a regulation but of violating a statute which required him to file an income tax return.").

[Emphasis in original].

We are aware of no contrary authority, **[*40]** and the Defendants do not draw our attention to any. See, e.g., *James v. United States, 970 F.2d 750, 753-54 n. 6 (10th Cir. 1992)*("Lack of an OMB number on IRS notices and forms does not violate [the PRA]"); *United States v. Neff, 954 F.2d 698, 699 (11th Cir. 1992)*("Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress."); *United States v. Kerwin, 945 F.2d 92 (5th Cir. 1992)*("Paperwork Reduction Act does not apply to the statutory requirement that a taxpayer must file a return"); *United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990)*("Defendant was not convicted of violating a regulation but of violating a statute which required him to file an income tax return."); *United States v. Pottorf,*

supra at 1176-77 ("Because the duty to file income tax returns arises out of valid federal statutes rather than regulations, the court finds that the defendant's argument that the penalty bar contained in the PRA at *44 U.S.C. § 3512* warrants dismissal of the instant Indictment is without merit.").

As the Defendants have correctly recognized -- given their objection to the absence of any implementing tax regulations **[*41]** -- they are being prosecuted for claimed violations of a tax statute, which imposes criminal proscriptions mandated by Congress, and they can find no refuge from those proscriptions, and the resultant prosecution, in the PRA. While we could find no direct authority in this Circuit which adopts the general rule that we have relied upon, we are persuaded that, if confronted with the same issue, our Court of Appeals would adopt the universal rule of its sister Circuits. Cf., *United States v. Axmear, 964 F.2d 792, 794 (8th Cir. 1992),* cert. denied, *506 U.S. 981 (1992); United States v. Holden, 963 F.2d 1114, 1116 (8th Cir. 1992),* cert. denied, *506 U.S. 958, 121 L. Ed. 2d 342, 113 S. Ct. 419 (1992).* n19 Accordingly, these arguments should be rejected.

n19 Relying upon decisions involving the Drug Enforcement Administration, the Defendants contend that there has not been an appropriate delegation of authority and, therefore, that their Indictments should be dismissed. We find no basis for the argument that the Defendants have attempted to advance, nor do the Defendants cite any apposite authority to responsibly suggest that the Indictments, here, should be dismissed on any legally cognizable ground.

Similarly, the Defendants urge that the provisions of Title *26 U.S.C. § 6020*(b) obligates the Secretary of the Treasury to file an income tax return, on their behalf, when they have elected to forego such a filing. Not surprisingly, the Defendants cite no authority for that proposition, either. Indeed, the authority is resoundingly to the contrary. See, e.g., *United States v. Stafford, 983 F.2d 25, 27 (5th Cir. 1993)*("'The jury cannot be allowed to decide on its own that § 6020(b) somehow makes lawful the failure to file a return,' when it does not."); *Geiselman v. United States, 961 F.2d 1, 5 (1st Cir. 1992),* cert. denied, *506 U.S. 981 (1992); United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992)*("The district court was thus correct in instructing the jury that [Section 6020(b)] does not relieve the [defendants] of their duty to file a tax return."); *Schiff v. United States, 919 F.2d 830, 832 (2nd Cir. 1990)*(Where taxpayer fails to file a return, "there is no requirement that the IRS complete a substitute return."), cert. denied, *501 U.S. 1238, 115 L. Ed. 2d 1037, 111 S. Ct. 2871 (1991); United States v. Verkuilen, 690 F.2d 648, 657 (7th Cir. 1982).*

Nor are we persuaded that Brian Madge's assertion that the Federal income tax filing requirements are "unintelligible," warrants a dismissal of his Indictment. As are so many of the Defendants' arguments, this defense is so fact-driven as to be beyond resolution under Rule 12, Federal Rules of Criminal Procedure, where we are not empowered to reach the "general issue," which will, or may well be, litigated at the time of Trial.

[*42]

C. The Defendants' Motion to Dismiss their Indictment for Failing to Properly Plead Elements of a Charged Offense.

In Count One of their Indictment, the Defendants are charged with a conspiracy, in violation of Title *18 U.S.C. § 371,* as follows:

From on or about April 1, 1992, and continuing thereafter up to and including the date of this indictment, in the State and District of Minnesota, the defendants *** did unlawfully, willfully and knowingly combine, conspire[,] confederate and agree together with each other and with other individuals both known and unknown to the Grand Jury to corruptly endeavor to obstruct and impede the due administration of the Internal Revenue Code of the United States in the ascertainment, computation, assessment and collection of revenue: to wit, income taxes.

Thereafter, in the remaining paragraphs of Count One, which consume a full nine pages of typewriting, the "manner and means" of the alleged conspiracy, and the specific "overt acts," which were assertedly committed in furtherance of the conspiracy, are detailed.

Nevertheless, the Defendants contend that the Indictment is deficient in failing to specifically plead "the **[*43]** intent of 'dishonest means.'" Of course, we have no hesitation in accepting that a section 371 conspiracy includes, as an essential element of proof, an intent, on the part of the accused, to interfere with, or obstruct, the government's function by some dishonest means. As explained by our Court of Appeals, in *United States v. Murphy, 957 F.2d 550, 553 (8th Cir. 1992):*

To establish a conspiracy to defraud, the government must show that [the defendant] conspired "to interfere with or obstruct one of [the United States'] lawful government functions by deceit, craft or trickery, or at least by means that are dishonest." See, *McNally v. United States, 483 U.S. 350, 359, 97 L. Ed. 2d 292, 107 S. Ct. 2875* *** (1987), citing *Hammerschmidt v. United States, 265 U.S. 182, 188, 68 L. Ed. 968, 44 S. Ct. 511* *** (1924).

Contrary to the Defendants' contention, however, we find no inadequacy in the Indictment's pleading of dishonesty. While, to be sure, the Indictment does not employ the term "dishonest," on more than one occasion, the Indictment expressly accuses the Defendants of acting "corruptly." More importantly, a sensible reading of Count One plainly discloses **[*44]** the Government's position that the Defendants have avoided lawful income taxation by dishonest means.

According to the allegations of Count One, Foster has engaged in the creation of trusts which have had, as a principal purpose, the concealment of income from lawful taxation, and the Madges retained Foster, at a fee, to so cloak their income from Federal taxation. As related in Count One, the Madges, with the assistance of Foster, were able to secrete substantial sums of money which, ordinarily, would be subject to income taxation, in order that the same funds could be expended for the Madge's personal benefit -- that is, on Darlow Madge's "home mortgage payments; landscaping; snowmobiles; jet-skis and vacations;" or on Brian Madge's "home mortgage payments; vehicle payments; and home repairs and improvements." In the words of the Indictment, this "manner and means" was employed to "corruptly endeavor to obstruct and impede the due administration of the Internal Revenue Code in the ascertainment, computation, assessment and collection of income taxes * * *." Notwithstanding the Defendants' apparent gloss on the allegations of Count One, there can be no serious doubt that, read as **[*45]** an integrated whole, the allegations of Count One, assert a dishonesty, on the Defendants' part, to avoid lawful taxation. We are unable to interpret, responsibly, the term "corruptly" as benignly as the Defendants appear to contend.

Lastly, our conclusion as to the adequacy of Count One in alleging dishonesty, on the Defendants' part, to obstruct the Government's lawful enforcement of the Internal Revenue Code, is consistent with controlling precedent within this Circuit. In *United States v. Rabinowitz, 56 F.3d 932, 934 (8th Cir. 1995),* the Court rejected an argument, closely analogous to that of the Defendants, as follows:

> [The defendant] next argues the district court committed plain error in failing to instruct the jury on an essential element of defrauding the United States in violation of § 371: the use of deceitful or dishonest means. See, *United States v. Caldwell, 989 F.2d 1056, 1059-61 (9th Cir. 1993);* n20 see also *United States v. Murphy, 957 F.2d 550, 553 (8th Cir. 1992)*(listing elements of crime). We disagree. Count 1 of the indictment specifically described the charged conspiracy as one to "defraud" the United States by impeding the IRS, and the district **[*46]** court read the entire indictment during the jury instructions. Nothing in the record suggests the jury was led to believe the term meant anything other than its common definition.
>
> We are confident that, if the term "defraud" is sufficiently informative to include the concept of "dishonesty," then surely the term "corruptly" unequivocally denotes the presence of fraud, deceit, trickery and dishonesty. Indeed, we ascribe to, and adopt, the following observation of our Court of Appeals, in Murphy:
>
> We are mindful that "indictments under the broad language of the general conspiracy statute [section 371] must be scrutinized carefully *** because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *** Even so, we cannot say the facts of this case are insufficient to establish a dishonest impairment of a government function. Conspiracies to defraud the United States under section 371 can take many forms. *** [The defendant's] intent to defraud can be inferred from both his longstanding tacit agreement with [another] and the nature of his employment. *** A reasonable juror could **[*47]** properly conclude that Murphy intended to dishonestly obstruct a lawful government function.
> *United States v. Murphy, supra at 553.*

We think the very same may be said here and, accordingly, we recommend that the Defendants' Motion to Dismiss, on this ground, be denied. n21

> n20 We think it particularly significant that our Court of Appeals expressly considered the Court's reasoning, in *United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993)* -- a decision upon which the Defendants heavily rely -- in concluding that the terms of an Indictment were sufficient, by reasonable inference, to draw a valid conclusion that the accused had engaged in dishonest acts which were susceptible to punishment under Title *18 U.S.C. § 371.*

As for the Defendants reliance upon *United States v. Cote, 929 F. Supp. 364 (D.Or. 1996),* we are not convinced that the reasoning of the Court comports with the established precedent of this Circuit, and we adhere to our Court of Appeals' holding in *United States v. Rabinowitz, 56 F.3d 932 (8th Cir. 1995),* and *United States v. Murphy, 957 F.2d 550 (8th Cir. 1992),* which we discuss in the text of this Opinion. **[*48]**

n21 In so recommending, we apply the standard enunciated by the Supreme Court, in *Hamling v. United States, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974):*

Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of further prosecution for the same offense. *** It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States v. Carll, 105 U.S. 611, 612, 26 L. Ed. 1135 (1882).* "Undoubtedly, the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. *United States v. Hess, 124 U.S. 483, 487, 31 L. Ed. 516, 8 S. Ct. 571 (1888).*

The Indictment here handily surpasses this standard of sufficiency.

[*49]

D. The Defendants' Motion to Suppress Evidence Obtained by Search and Seizure.

The Defendants contend that the Warrants in contest were issued without probable cause, and that they were unconstitutionally overbroad. We separately address each of these issues. n22

n22 The Defendants also suggest that the officers, who executed the Warrants, did so with a reckless indifference to the Defendants' rights under the Fourth Amendment. Nevertheless, the Defendants have made no such showing, although their arguments are repeatedly punctuated with references to the searches having been conducted by "jack-booted thugs" with guns. Without a competent showing that the Search Warrants were improperly executed, we are not persuaded that the Defendants' concerns rise above their personal invective for Federal agents, whom they uniformly characterize as "Gecks/agents" and "vermin attorn'ies [sic]." Further we find, consistent with Malchow's testimony that any errant seizures have either been returned to Foster's satisfaction, or he dispensed with the need for further returns. As to the Madge's, we do not understand that any of their demands, for the return of wrongfully seized materials, have gone unanswered, for no such Motion presently pends before us. See, Rule 41(e), Federal Rules of Criminal Procedure. Finding no responsible basis upon which to do so, we address this aspect of the Defendants' Motions to Suppress no further.

[*50]

1. Standard of Review. In the issuance of a Search Warrant, the Fourth Amendment dictates that an impartial, neutral and detached Judicial Officer will assess the underlying factual circumstances so as to ascertain whether probable cause exists to conduct a search or to seize incriminating evidence, the instrumentalities or fruits of a crime, or contraband. *Warden v. Hayden, 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967); United States v. Johnson, 64 F.3d 1120, 1126 (8th Cir. 1995),* cert. denied, *U.S. , 116 S. Ct. 971 (1996).* In order to find probable cause, it must be demonstrated that, in light of all the circumstances set forth in the supporting Affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular, designated place. *United States v. Gladney, 48 F.3d 309, 313 (8th Cir. 1995); United States v. Tagbering, 985 F.2d 946, 949 (8th Cir. 1993).* For these purposes, probable cause is "a fluid concept, turning on the assessment of probabilities in particular factual contexts, not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates, 462 U.S. 213, 232, 76* **[*51]** *L. Ed. 2d 527, 103 S. Ct. 2317 (1983);* see also, *Ornelas v. United States, U.S. , 116 S. Ct. 1657, 1661 (1996).*

The Application and Affidavits, which support a request for a Search Warrant, "should be examined under a common sense approach and not in a hypertechnical fashion." *United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993).* In conducting such an examination, the Court should review the Affidavits as a whole, and not

on a paragraph-by-paragraph basis. *United States v. Anderson, 933 F.2d 612, 614 (8th Cir. 1991); United States v. Townsley, 843 F.2d 1070, 1076-77 (8th Cir. 1988),* cert. dismissed, *499 U.S. 944 (1991).* Moreover, the reviewing Court must not engage in a de novo review but, rather, should accord great deference to the decision of the Judicial Officer who issued the Warrant. *United States v. Maxim, 55 F.3d 394, 397 (8th Cir. 1995),* cert. denied, *133 L. Ed. 2d 188, U.S. , 116 S. Ct. 265 (1995); United States v. Curry, 911 F.2d 72, 75 (8th Cir. 1990),* cert. denied, *498 U.S. 1094, 112 L. Ed. 2d 1065, 111 S. Ct. 980 (1991).* This mandated deference to the determination of the issuing Judicial Officer **[*52]** is consistent with the Fourth Amendment's sound preference for searches that are conducted pursuant to Warrants. *Illinois v. Gates, supra at 236.*

With respect to the permissible scope of a Search Warrant, "the fourth amendment requires that a search warrant describe with sufficient particularity the things to be seized in order to prevent a 'general, exploratory rummaging in a person's belongings.'" *United States v. Kail, 804 F.2d 441, 445 (8th Cir. 1986),* quoting *Coolidge v. New Hampshire, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971).* Since the degree of specificity, that is required in applying the particularity requirement, is flexible and may vary depending on the circumstances and the types of items involved, we apply a "practical accuracy" rather than a "technical nicety" standard. *United States v. Wayne 903 F.2d 1188, 1195 (8th Cir. 1990),* citing *United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976);* see also, *United States v. Lowe, 50 F.3d 604, 607 (8th Cir. 1995),* cert. denied, *U.S. , 116 S. Ct. 260 (1995); United States v. Hibbard, 963 F.2d 1100, 1102 (8th Cir. 1992),* citing *United States v. Pillow,* **[*53]** *842 F.2d 1001, 1004 (8th Cir. 1988).* As a result, "a search warrant involving a scheme to defraud is 'sufficiently particular in its description of the items to be seized if it is as specific as the circumstances and nature of activity under investigation permit.'" *United States v. Saunders, 957 F.2d 1488, 1491 (8th Cir. 1992),* cert. denied, *506 U.S. 889, 121 L. Ed. 2d 187, 113 S. Ct. 256 (1992),* quoting *United States v. Kail, supra at 445.*

2. Legal Analysis. We need not tarry in our resolution of the Defendants' probable cause challenge to the Warrants at issue, for we conclude, as did the Magistrate Judges who independently authorized their issuance, that an adequate showing of probable cause has, and had been, presented. In fact, none of the Defendants has particularized any claimed absence of probable cause, and a simple reading of the supporting Affidavits plainly allows a reasonable inference that, in all probability, a search of the Defendants' residences would uncover evidence of a Federal statutory violation, of the type that was itemized in paragraphs 23 and 24 of the Applications for the Madge Warrants, and in paragraphs 27 and 30 of the Application for the **[*54]** Foster Warrant.

Moreover, even if we were to conclude that the requisite showing of probable cause had been insufficient, we would, nonetheless, conclude that the searches were conducted in good faith and, therefore, were valid under the doctrine espoused in *United States v. Leon, 468 U.S. 897, 922, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984),* where the Supreme Court recognized an exception to the exclusionary rule in those cases in which a police officer conducts a search "in objectively reasonable reliance on a subsequently invalidated search warrant." In Leon, the Court outlined four situations in which an officer's reliance on a Warrant would be unreasonable:

(1) the affiant included information in the affidavit that he "knew was false or would have known was false except for his reckless disregard of the truth" and that information misled the issuing judicial officer;

(2) the issuing judge abandoned his neutral judicial role;

(3) the warrant was based on an affidavit with so few indicia of probable cause that an official belief in its validity would be unreasonable; and

(4) the warrant itself was so "facially deficient *** that the executing officers" **[*55]** could not reasonably rely on its validity.

United States v. Simpkins, 914 F.2d 1054, 1057 (8th Cir. 1990), cert. denied, *498 U.S. 1101, 112 L. Ed. 2d 1081, 111 S. Ct. 997 (1991).*

Here, the Defendants do not assert, let alone demonstrate, that the underlying Applications contained false information, or otherwise demonstrated a "reckless disregard for the truth." Nor have the Defendants urged that the issuing Magistrate Judges were less than neutral when issuing the Warrants, and we are unwilling to presume a lack of impartiality without a competent showing.

As to the final exceptions to the rule in Leon, we have found probable cause to believe that a search of the Defendants' residences would, in all likelihood, disclose the fruits of a crime, or contraband, as did two other Magistrate Judges. Given the unanimity of these judicial findings, we may not realistically hold a police officer to a higher standard in discerning probable cause than that exercised by neutral and detached Judges. Accordingly, on the Record before us, we have no competent basis upon which to conclude that the underlying Affidavits were "so lacking in indicia of probable cause as to render

official **[*56]** belief in its existence entirely unreasonable." *United States v. Leon, supra at 923;* cf., *United States v. Simpkins, supra at 1058* ("When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable."), quoting *United States v. Martin, 833 F.2d 752, 756 (8th Cir. 1987),* cert. denied, *494 U.S. 1070, 108 L. Ed. 2d 794, 110 S. Ct. 1793 (1990).*

Nor do we find the scope of the Search Warrants to be overbroad. In *United States v. Najarian, 915 F. Supp. 1441, 1458 (D. Minn. 1995),* we considered the same issue of overbreadth that the Defendants raise here, and we concluded that the "practical accuracy" standard should apply -- a standard that allows a degree of flexibility, in the particularity of a Search Warrant, that is commensurate with the nature of the suspected offense. See, e.g., *United States v. Stelten, 867 F.2d 446, 450 (8th Cir. 1989),* cert. denied, *493 U.S. 828 (1989); United States v. Kail, supra at 445; United States v. Saunders, supra at 1491.* Here, however, the Defendants suggest that the Warrants permitted a general exploratory search -- the type that our **[*57]** Court of Appeals condemned in *Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987).* We disagree.

In Rickert, the Court observed that, "although probable cause existed to search the records of one particular project, the warrant failed to so limit the search." Id. Rather, the Warrant authorized law enforcement to search and seize all manner of business records from three different development corporations, only as limited by a requirement that the records evidence "offenses in violation of Title *18, United States Code, Section 371,* and Title 26, United States Code, Sections 7206(2) and 7201." Id. In noting that both of the referenced Statutes were insufficient to limit a search of business records, the Court concluded that the challenged Warrants authorized a "general rummaging through the offices and company records." Id. The Court went on to expressly recognize that "all business records may be seized, however, if probable cause exists to believe that the entire enterprise has engaged in a pervasive scheme to defraud the IRS." Id.

Here, the Defendants acknowledge that they have elected not to file Federal income tax returns because of their belief that the **[*58]** income tax laws are not applicable to them. As the underlying Applications for Warrants make clear, the conduct, which is here at issue, has been both long-standing, and pervasive in scope. Accordingly, we assess the particularity of the Warrants according to the "practical accuracy" test. See, *United States v. Mosby, 101 F.3d 1278, 1281 (8th Cir. 1996),* pet. for cert. filed (U.S., February 28, 1997); *United States v. Peters, 92 F.3d 768, 769 (8th Cir. 1996); United States v. Lowe, 50 F.3d 604, 607 (8th Cir. 1995),* cert. denied, *U.S. , 116 S. Ct. 260 (1995).*

As a consequence, "the specificity [of a Warrant] hinges on the circumstances of each case," United States v. Peters, supra at 607, and, "where the precise identity of a good cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice." *United States v. Krasaway, 881 F.2d 550, 553 (8th Cir. 1989),* quoting *United States v. Porter, 831 F.2d 760, 764 (8th Cir. 1987),* cert. denied, *484 U.S. 1069, 98 L. Ed. 2d 1001, 108 S. Ct. 1037 (1988).* Here, as to each of the Warrants in question, we find no fatal nonspecificity in the issuing Court's **[*59]** particularization of the items to be seized, given the narrowly tailored specification of the documents to be seized, and the presence of conspiratorial charges involving allegations of permeating fraud. See, *United States v. Dockter, 58 F.3d 1284, 1288-89 (8th Cir. 1995),* cert. denied sub nom. *Shulze v. United States, 133 L. Ed. 2d 859, U.S. , 116 S. Ct. 932 (1996).*

Even if we were to have found that the Warrants suffered from overbreadth, we would, nevertheless, conclude that the searches in question were conducted in good faith, for reasons we have already addressed in the context of our probable cause finding. Our Court of Appeals, in *United States v. Stelten, supra at 451,* concluded that *United States v. Leon, supra,* applies to Warrants which are broadly worded, but which are not "so facially deficient *** that the executing officers [could not] reasonably presume it to be valid." n23

n23 We note that the dissent in Stelten urged that the "good faith" exception of *United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984),* should not apply to ostensibly overbroad Warrants, for reasons expressed in *United States v. Strand, 761 F.2d 449 (8th Cir. 1985).* See, *United States v. Stelten, 867 F.2d 446, 451-52 (8th Cir. 1989),* cert. denied, *493 U.S. 828 (1989).* The majority of the panel, in Stelten, was not so persuaded, and Stelten continues to be the law of this Circuit.

[*60]

Accordingly, finding no basis upon which to suppress the evidence seized in the warranted searches of the Defendants' residences, we recommend that their Motions to Suppress be denied. n24

n24 We find no need to conduct a further Evidentiary Hearing on the Madges' newly

formalized challenge to the Warrants to search their residences. We previously allowed the Defendants a full opportunity to address the pending Motions as they thought appropriate, and the Madges had advanced no particularized showing that a further Hearing is warranted.

NOW, THEREFORE, It is --

ORDERED:

1. That the Motions of Darlow and Brian Madge for Jury Questionnaires, and for early disclosure of Jury Panel List [Docket Nos. 54, 55, and 67] are DENIED, without prejudice, as premature.

2. That the Motions of Darlow and Brian Madge for Disclosure of and to Make Informant Available for Interview [Docket Nos. 52 and 56] are DENIED.

3. That the Defendants' Motions to Compel Attorney for the Government to Disclose Evidence Favorable to **[*61]** the Defendant [Docket Nos. 33 and 41] are GRANTED to the extent allowed in the text of this Order.

4. That the Defendants' Motions for Disclosure of 404 Evidence [Docket Nos. 35, 43 and 61] are GRANTED to the extent allowed in the text of this Order.

5. That the Motions of Darlow and Brian Madge for Disclosure of Grand Jury Minutes and Transcripts [Docket Nos. 48 and 64] are DENIED.

6. That the Motion of Brian Madge for discovery and Inspection of Products and Records of Electronic Surveillance [Docket No. 39] is DENIED, as moot.

7. That the Motion of Brian Madge to Disclose Post Conspiracy Statements of Co-Defendants [Docket No. 50] is GRANTED.

8. That the Order of April 9, 1997, which awarded subsistence expenses to Brian Madge is VACATED, as improvidently awarded, and the parties seeking such expenses are directed to provide the undersigned with additional documentation, as described in the text of this Order.

9. That the Government's Motions to Strike Pro Se Pleadings [Docket Nos. 69 and 97] are DENIED.

10. That the Motion of Darlow Madge for a Bill of Particulars on Counts II, III, IV, and V [Docket No. 114], is DENIED.

11. That the Motion of Darlow Madge **[*62]** to Allow Filing of Pleadings Pro Se [Docket No. 116] is GRANTED.

12. That the Motions of Darlow Madge, and Foster, to Join Co-Defendants' Motions [Docket No. 117 and 121] are GRANTED.

13. That the Motion of Brian Madge to Add Exhibits to Previously Filed Motion [Docket No. 124] is GRANTED.

14. That the Motions of Darlow and Brian Madge to Strike Previous Discovery by Court Appointed Counsel [Docket Nos. 126 and 128] are DENIED, as without merit.

15. That the Motion of Darlow Madge for a Declaratory Judgment [Docket Nos. 127 and 129] is DENIED, as moot.

16. That the Government's Motions to Strike Defendants' Motions as Untimely [Docket Nos. 132, 136, 142 and 143] are DENIED.

17. That the Motion of Darlow Madge to Waive Right to Speedy Trial Act, in order to allow the conduct of an Evidentiary Hearing [Docket No. 133], is DENIED, as moot.

18. That the Motion of Karl L. Foster for Enlargement of time Under Rule 45(b) [Docket No. 17] is DENIED, as moot.

19. That the Motions of Brian Madge to Join Co-Defendants' Motions [Docket No. 107] are GRANTED.

AND, It is --

RECOMMENDED:

1. That the Defendants' Motions to Suppress Evidence Obtained by Search and Seizure [Docket Nos. 27, 51, and 138] be denied.

2. That the Motions of Darlow and Brian Madge for the Discovery and Suppression of Confessions or Statements in the Nature of Confessions [Docket Nos. 46 and 59] be denied, **[*63]** as moot.

3. That the Motions of Foster to Dismiss Indictment for Failure to State an Offense [Docket Nos. 31, 37 and 122] be denied.

4. That the Motions of Brian Madge to Dismiss Indictment for Failure to State an Offense [Docket Nos. 47, 108 and 109] be denied.

5. That the Motion of Brian Madge to Dismiss Counts 6 and 7 for Failure to Establish a Tax Liability and Mistake of Law [Docket No. 106] be denied.

6. That the Motion of Darlow Madge to Dismiss Indictment for Failure to State an Offense [Docket No. 58] be denied.

7. That the Motion of Darlow Madge to Dismiss Case on Jurisdictional Grounds, and Founded Upon Fraud [Docket Nos. 111, 120 and 134] be denied.

8. That the Motion of Darlow Madge to Dismiss Count 1 for Failure to Plead Intent Element [Docket No. 112] be denied.

9. That the Motion of Darlow and Brian Madge for Clarification, for Judicial Notice, and to Dismiss [Docket No. 140] be denied.

10. That the Motions of Brian and Darlow Madge to Dismiss Indictment [Docket Nos. 48 and 64] be denied.

Raymond L. Erickson

UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 45(a), Federal Rules of Criminal Procedure, D. Minn. LR1.1(f), and D. Minn. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, **[*64]** and by serving upon all parties **by no later than June 13, 1997**, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing **by no later than June 13, 1997**, unless all interested parties stipulate that the District Court is not required by Title *28 U.S.C. § 636* to review the transcript in order to resolve all of the objections made.