UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,	**Case No.: No. Criminal No. 1:06-cr-00071-SM**
Plaintiff,	
vs.	
ELAINE A. BROWN and, EDWARD LEWIS BROWN,	
Defendant	

NOTICE OF MOTION AND MOTION TO DISMISS

JUDICIAL AND ADMINISTRATIVE NOTICE

The Defendants in propria persona without representation by an attorney notice this court and all parties involved in the above captioned case, of their motion to Dismiss the Indictment and the included memorandum. Officers of the court are hereby noticed of their continuing duty under authority of the supremacy; equal protection and full faith and credit clauses of the United States Constitution and the common law authorities of Haines v. Kerner, 404 U.S. 519-421, Platsky v. C.A.A. 953 F.2d. 25, and Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). In Haines: pro se litigants are held to less stringent pleading standards than bar licensed attorneys.

Regardless of the deficiencies in their pleadings, pro se litigants are entitled t the opportunity to submit evidence in support of their claims. In Platsky: court errs if courts dismisses the pro se litigant without I instructions of how pleadings are deficient and instructions to repair pleadings. In Anastasoff: litigants' constitutional Rights are violated when courts depart from precedent where parties are similarly situated.

On a date to be named by the court, the Accused, Elaine and Edward Brown will move the court for an order dismissing all counts of the indictment herein for failure to contain the elements of the offense intended to be charged and sufficiently apprise the Accused of what they must be prepared to meet.

This motion will be based on the Notice of Motion and attachments thereto, the Memorandum of Points and Authorities in support thereof and the record, papers and files in the above-entitled matter.

MOTION TO DISMISS

Elaine A. Brown and Edward L. Brown, husband and wife, Defendants herein, move this court pursuant to Rule 12 (b)(2) of the Federal Rules of Criminal Procedure to dismiss the instant case on the following grounds:

1. The indictment fails to set forth any statute, if any such statute exists, which makes the Defendants **subject to (liable for)** any tax whatsoever.
2. The indictment fails to set forth any statute, if any such statute exists, which requires the Defendants to pay any tax whatsoever.
3. The indictment fails to set forth any statute, if any such statute exists, which requires the Defendants to make a tax return of any kind whatsoever.
4. The indictment fails to set forth any statute, if any such statute exists, which imposes a tax on either people, or property, or activities (or events, incidents or occasions).
5. The indictment merely indicates the penalty statutes under Title 26 U.S.C. Sections 7201 & 7202, which merely state the penalties for violations of unspecified portions of Title 26.
6. Counts 1, 15,16 and 17 derive from Counts 2 through 14.
7. The indictment fails to set forth any criminal intent with respect to all counts, most specifically to Counts 1, 15, 16, and 17.
8. The indictment fails to indicate the "$100,000 in a 12-month period" as described in Count 17.
9. The indictment fails to show the "illegal activity" as stated in Count 17.
10. The defects in this indictment cannot be cured by a bill of particulars.

SUMMARY

The indictment is replete with legal conclusions stripped of evidencing statements of fact, none of which apprise the Defendants of the nature and cause of the accusation. Legal conclusions without supporting statements of fact fail to make a valid indictment. Furthermore, the indictment fails to state any statute, if any such statute exists, imposing any obligation whatsoever on the Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

The Sixth Amendment to the Unites States Constitution requires that in all criminal proceedings, the accused shall have the right to be informed of the nature and cause of the accusation.

This right has been upheld many times by the United States Supreme Court as being fundamental in the law of Criminal Procedure:

> The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made

> up of act and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances. *United States v. Cruikshank,* 92 U.S. 542, at 558 (1876).

The United States Supreme Court continues to rely on the fundamental principles stated in *United States v. Cruikshank, supra*. For example, see *Russell v. United States,* 369 U.S. 749, at 765 (1962).

Title 26 U.S.C. Section 7201 is quoted in its entirely as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution. *26 U.S.C. 7201.* (Emphasis added.)

Title 26 U.S.C. Section 7202 is quoted in its entirety as follows:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction

> thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. *26 U.S.C. 7202.* (Emphasis added).

Sections 7201 and 7202 of Title 26 U.S.C. are clearly, and more importantly, only penalty statutes. While the so-called "indictment" states: "In violation of . . .Section 7201" and "In violation of. . .Section 7202", the penalty statutes simply cannot be violated. The penalty statutes merely state the penalties for violations of unspecified portions of Title 26. The so-called "indictment" fails to state which, if any, of the unspecified portions of Title 26 have supposedly been violated.

The Defendants are left to guess at which statutes, if any, they have supposedly violated.

The Ninth Circuit has addressed the issue here raised in *Steiner v. United States,* 229 F.2d 745, (9th Cir., 1956). The Defendants in *Steiner* contended that certain counts of the indictment failed to state an offense against the United States. The Defendants were charged in several counts under 18 U.S.C. 545, with knowing and fraudulent importation and transportation of certain birds, "contrary to law". Like 26 U.S.C. 7201 and 7202,18 U.S.C. provides criminal penalties for violation of other provisions of law. 18 U.S.C. 545 simply provided penalties for the importation of "any merchandise contrary to law". The court held that:

> [E]ach of counts 8, 9, 10, and 11 attempted to charge a violation of 18 U.S.C. 545 and did not charge or attempt to charge any other offense. However, each of counts 8, 9, 10 and 11 failed to state what law (other than 18 U.S.C. 545) the importation mentioned therein was contrary to, or in what respect such importation was contrary to such law. Thus each of counts 8, 9, 10 and 11 failed to charge a violation of 18 U.S.C. 545 and failed to charge an offense against the United States. *Steiner v. United States*, 229 F.2d 745, 748 (9th Cir., 1956).

The *Steiner Court* further stated that the defects in such an indictment could not be cured by a bill of particulars.

> The defects in counts 8, 9, 10 and 11 could not have been cured by a bill of particulars. It is therefore immaterial that appellants did not move for such a bill. *Steiner, supra,* at 748.

The significance of sufficiently specific notice of criminal accusations is discussed in *Russell v. United States,* 369 U.S. 749 (1962). In that case, Defendants were charged with refusal to answer questions which were "pertinent to the matter under inquiry", yet the indictment only stated this element of the offense in conclusory terms, and did not specifically inform the Defendants what the specific "matter under inquiry" was.

The Supreme Court held that "The vice of these indictments . . .is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, i.e., that they

failed to sufficiently apprise the defendant 'of what he must be prepared to meet.'" *Russell, supra* at 764. The court further held that where the definition of a crime includes generic terms, it is not sufficient for the indictment to charge the offense in the same generic terms. Instead, it must state those particulars which are necessary to apprise the defendant "with reasonable certainty, of the nature of the accusations against him". *Russell, supra,* at 765, The court in *Russell* pointed out that the government's theory of what the "pertinent matter under inquiry" was changed from the trial stage to the appellate stage of that case. This, the court pointed out, is precisely one of the reasons that sufficiently specific pleading is required. *Russell, supra,* 767-768.

The *Russell Court* additionally explains why a bill of particulars cannot save an invalid indictment.

> But it is a settled rule that a bill of particulars cannot save an invalid indictment. [Citations omitted.]. . . When Congress provided that no one could be prosecuted under 2 U.S.C. § 192 except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as

to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure from Arrest to Appeal, 253.

The underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. [Citations omitted.] "If it lies within the province of a court to change part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand

> jury, and the prisoner can be called upon to answer the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." [Citation omitted.] We reaffirmed this rule only recently, pointing out that "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." [Citation omitted.] *Russell v. United States,* 369 U.S. 749m 770-771 (1962).

The so-called "indictment" is written in conclusory terms. In all counts, the indictment fails to state which law or statute, if any such statute exists, that imposes a requirement of the Defendants. The Defendants are left to guess which statute, if any, they must be prepared to meet.

Furthermore, in conclusory terms, the indictment uses the phrases, "well knowing", "unlawfully", "willfully, knowingly conspire", "taxable income", "income tax", "willfully failed to collect", "willfully attempt", "calendar year", "failing to make an income tax return", "required by law", "failing to pay", but fails to state any statute whatsoever that the Defendant failed to obey. The Defendant cannot make a defense to unknown statutes, if any exist, that they must be prepared to meet.

The so-called "indictment" uses the phrase "income tax" and "taxable income" but fails to state whether the subject of such purported so-called "income tax" and "taxable income" is people, property, or activities, and further fails to state which statute, if any, imposes a tax upon any of those particular subjects.

In delivering the opinion of *Brushaber v. Union Pacific R.R.Co.*, 240 U.S. 1 (1916),1 Chief Justice Edward Douglas White stated that:

> Moreover in addition the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such. . . . *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 16-17 (1916). (Emphasis added.)

Later, explaining what was settled in the *Brushaber Case,* the same Chief Justice Edward Douglas White stated:

> [B}y the previous ruling [*Brushaber Case*] it was settled that the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning [of our national government under the Constitution] from being taken out of the category of indirect taxation to which it inherently belonged. . . .*Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916). (Emphasis and explanation added.)

In 1930, the United States Supreme Court explains that an indirect tax is not a property tax, but rather a tax laid upon the happening of an event.

> A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax. *Tyler v. United States*, 281 U.S. 497, 502 (1930).

In 1937, 24 years after the Sixteenth Amendment, the United States Supreme Court recognized that capitation taxes and property taxes must still be apportioned among the States according to census or enumeration. (The Defendants submit that there is presently no federal tax that is apportioned among the States, and that there has not been any direct tax successfully imposed since the days of the Civil War.) The United States Supreme Court further recognized that duties, imposts and excises are in the category of indirect taxes. While ruling on a tax collected from corporations under the Social Security Act of 1935, the United States Supreme Court stated:

> The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises." Art. 1, §8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include

> every form of tax appropriate to sovereignty. [Citations omitted.] Whether the tax is to be classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" [Citations omitted], or a "duty" [Citations omitted]. A capitation or other "direct" tax it certainly is not. *Steward Machine Co. v. Davis,* 301 U.S. 548, 581-582 (1937). (Emphasis added.)

In 1960 a federal appellate court explains that capitation taxes and property taxes must be apportioned in compliance with Article I, §2, cl. 3 and Article I, §9, cl. 4 of the United States Constitution, and that an "income" tax (so-called) is not a direct tax, but rather an indirect tax.

> This is an income tax case where the Tax Court has sustained the Commissioner [of Internal Revenue] as against the taxpayer, 1959, 32T.C. 653.

> Indeed, the requirement for apportionment is pretty strictly limited to taxes on real and personal property and capitation taxes. *Penn Mutual Indemnity Co. v. C.I.R.*, 277 F2d 16, at 17, 19-20 (3rd Cir. 1960). (Emphasis and explanation added).

In the *Brushaber Case, supra,* (which stated that an "income" tax was in its nature an excise), the United States Supreme Court relied in part on an earlier ruling in *Flint v. Stone Tracy Co.*-, 220 U.S.

107, (1911). The *Flint Case* instructs us on the **subjects of** income taxes.

> Excises are "taxes laid upon the manufacture, sale or consumption of commodities within a country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley, Const. Lim., 7th ed., 680. *Flint v. Stone Tracy Co.*, 220 U.S. 107 at 151 (1911).

The indictment fails to state any activity, event, incident, or occasion upon which the purported tax in question is imposed, and fails to state any statute that imposes a tax on the particular subject, and further, fails to state any statute that makes the Defendants **subject to (liable for)** such a tax. The Defendants are left to guess at which statutes, if such statutes exist, that they must be prepared to meet.

Even if the purported tax in question were to be viewed as a property tax, the indictment fails to state precisely upon which property the purported tax is imposed, and fails to state which statute, if any, that imposes a tax on the particular property, and further fails to state any statute, if any such statute exists, that make the Defendants **subject to (liable for)** such a tax. The Defendants are left to guess at which statutes, if any such statutes exist, that they must be prepared to meet.

The term "**liable for**" as used herein is to have the same meaning as the term "**subject to**". The term "**liable for**" is to be

distinguished from the phrases "tax liability" or "tax deficiency". (Defendants submit that one cannot have a tax deficiency (a tax due and owing), or fail to pay a tax, unless he is first **subject to (liable for)** a tax.)

> The courts have ruled that **subject to** means **liable for.**
>
> We see no distinction between the phrases "**liable for** such tax" and "**subject to** a tax". *Houston Street Corp. v. C.I.R.*, 84 F2d 821, at 822 (5th Cir. 1936). (Emphasis added.)

The indictment fails to state any such statute, if such statute exists, that makes the Defendants –**liable for (subject to)** any tax whatsoever.

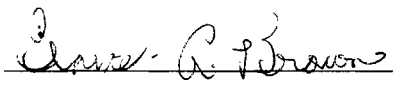
The Ninth Circuit in *Steiner* makes it clear that an indictment which merely sets forth the penalty statute, but fails to set forth the precise statute that supposedly has been violated, fails to charge an offense against the United States, and renders the indictment defective. The indictment in this instant case contains the same kind of defects as those found in *Steiner.*

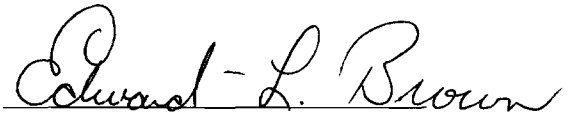
WHEREFORE ,it is respectfully requested that this court (1)Dismiss the indictment in this action as insufficient to give the Defendants, Elaine and Edward Brown, adequate notice of the nature and elements of the accusations being brought against them; (2) Enjoin the United States from any further harassment of Elaine Brown and Edward Brown; (3) Stay all further proceedings until such time as the United States

complies with the organic law; or in the alternative certify the question regarding the sufficiency of the indictment, regarding whether it comports with the requirements of Sixth Amendment of the United States Constitution, for an interlocutory appeal to the United States Court of Appeals for the First Circuit.

ORAL ARGUMENT DEMANDED

Respectfully submitted



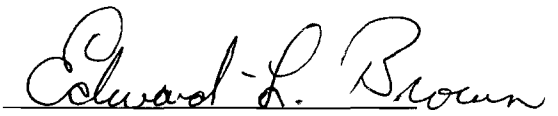


Elaine-A. Brown Edward-L. Brown

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was sent by USPS first class mail to William E. Morse, AUSA at 53 Pleasant St., Concord, N.H.

Edward-L.Brown



James R. Starr, Clerk
Clerk's Office
Warren B. Rudman U.S. Courthouse
55 Pleasant Street, Room 110
Concord, NH 03301-3941.

September 1, 2006

Via Certified Mail
#7006 0810 0002 7165 6809

Re: 01:06-cr-00071-SM UNITED STATES OF AMERICA v. Elaine Brown; Ed Brown

Dear Mr. Starr:

Please timely file the enclosed Defendants' motion into the above captioned case file and make a suitable docket entry. I have already mailed a true copy of the enclosed motion to the United States Attorneys office.

With all due respect,

Edward Lewis Brown

Edward Lewis Brown
c/o 401 Center of Town Road
Plainfield, New Hampshire