

In the  
**United States Court of Appeals**  
For the Seventh Circuit

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Nos. 87-1882, 87-2644

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

GILLAM KERLEY,

*Defendant-Appellant.*

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Appeal from the United States District Court for  
the Western District of Wisconsin.  
No. 82 CR 47—John C. Shabaz, *Judge.*

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ARGUED NOVEMBER 9, 1987—DECIDED JANUARY 28, 1988  
SUPPLEMENTAL OPINION MARCH 23, 1988

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Before POSNER, EASTERBROOK, and KANNE, *Circuit Judges.*

PER CURIAM. The petition for rehearing, filed by the defendant, Gillam Kerley, persuades us that Kerley is entitled to a new trial; and we modify our decision of January 28, \_\_\_ F.2d \_\_\_, accordingly.

We held that the district judge had erred in failing to make clear in his instructions to the jury that to be found guilty of the crime of refusing registration in the armed forces (50 U.S.C. § 462(a)) Kerley had to have known that he had a duty to register, that is, had to have acted willfully; it was not enough to tell the jury that it had to

find that Kerley had known he had not registered. But we further held that this was not a plain error in the circumstances and hence that Kerley could not upset his conviction unless he had stated his ground for objecting to the instructions—and, we said, he had not.

In this we erred. We were led into error by Kerley's appellate counsel, who failed to include in the joint appendix on appeal the relevant pages of transcript showing that Kerley had stated his ground for his objection, and by the government, which should have brought the oversight to our attention. Kerley's counsel has rectified the oversight in his petition for rehearing, and the government in its response does not argue that the rectification comes too late for us to consider it.

Judge Shabaz had delegated the preparation of a final pretrial order to a magistrate; as part of the final pretrial conference the magistrate held a charging conference at which the parties submitted proposed instructions and objections thereto. Kerley objected to the instruction that required the jury to find only a knowing (in the narrow sense indicated earlier), and not also a willful, refusal to register, saying that "to knowingly fail to perform a duty a person must be aware of a duty and deliberately or willfully neglect to perform it." The magistrate incorrectly replied "that the definition of knowingly addresses the very problem about which you expressed concern," but added, "I have noted your objection for Judge Shabaz." The final pretrial order recited that Kerley objected to the instruction in question "in that it fails to include an element of willfulness or a showing of specific intent." At the instructions conference at trial, Judge Shabaz stated, "I do note the or perhaps the continuing objections that you may have as to the substance instructions, the elements of the offense." In light of this statement there was no need for Kerley to renew his objection on the matter of willfulness. In the circumstances, Kerley (who was not represented by counsel at trial) adequately stated the grounds for his objection, and therefore complied with Rule 30 of the Federal Rules of Criminal Procedure. The ground

was valid, and the error, while not plain, was not harmless either; it was a reversible error, so Kerley is entitled to a new trial.

The other grounds on which he seeks a rehearing have no merit, and there is no need to modify any part of our opinion except the statement that Kerley failed to object and the conclusion that he is not entitled to a new trial.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*