IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket No. 87-1882

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILLAM KERLEY,

Defendant-Appellant.

On Appeal from Judgment of Sentence, dated May 29, 1987, in Crim.No. 82-CR-47, in the United States District Court for the Western District of Wisconsin (John C. Shabaz, J.)

APPELLANT'S OPENING BRIEF

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1. Was the trial court's charge to the jury on the elements of the offense erroneous in failing to require specific intent to violate a known legal duty, and in stating that the required *mens rea* is not a separate element from the prohibited *actus reus*?

2. Did the trial court err in refusing to dismiss the indictment and in charging the jury on the theory that refusal or evasion of draft registration is a continuing offense?

3. Should the indictment have been dismissed because the unresolved litigation in *Rostker v. Goldberg* precluded *mens rea* from July 1980 through June 1981 as a matter of law?

4. Did the court err in refusing to instruct the jury, as requested by the defendant, that the accused's uncorroborated statement is not a sufficient basis for conviction?

5. Did the court err by instructing the jury that if they entertained a reasonable doubt about the defendant's guilt then they "should" acquit him, when the law requires that in that event they *must* acquit?

6. Did the court err in sentencing the defendant to a lengthy term of imprisonment based in part on the erroneous

claim that he was "aiding, abetting and encouraging" others to refuse draft registration, where all of the defendant's activities have been scrupulously within First Amendment bounds; and to a maximum fine on the basis that he has been, in the judge's view, underemployed (by virtue of his constitutionally-protected choice to pursue low-paid political activity)?

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Wisconsin (The Honorable John C. Shabaz, Judge) had subject matter jurisdiction of this case under 18 U.S.C. § 3231, in that the indictment charged an offense against the United States, to wit, refusal or evasion of registration under the Military Selective Service Act, in violation of 50 U.S.C. Appx. § 462(a). App. 15. This Court's jurisdiction rests upon 28 U.S.C. § 1291, in that the District Court's May 29, 1987, imposition of a sentence of three years' imprisonment and a $10,000 fine was a final order. Notice of appeal was timely filed on June 1, 1987. Fed.R.App.P. 4(b). See U.S.D.C. Dkt. Entries 312, 314; App.130.

STATEMENT OF THE CASE

On April 21, 1987, after a two-day jury trial in the Western District of Wisconsin, the appellant, Gillam Kerley, was convicted on a one-count indictment charging nonregistration for the draft, 50 U.S.C. Appx. § 462(a). On May 29, 1987, the Honorable John C. Shabaz, U.S.D.J., imposed a sentence of three years' imprisonment and a committed fine of $10,000. App. 156. (On June 19, 1987, at the conclusion of a hearing on Mr. Kerley's motion for release pending appeal, the Court sua sponte changed the fine to uncommitted. App. 154 (implementing order). Appellant, who had been free on personal recognizance bond for some four and one half years pending trial, was allowed a temporary stay of execution pursuant to Fed.R.Crim.P. 38(a)(2). Denied release pending appeal, he voluntarily surrendered himself for service of sentence on July 10, 1987.

a. The Course of Proceedings Below

A one-count indictment filed Sept. 8, 1982, accused Gillam Kerley of "knowingly and willfully" failing, evading and refusing to register for the military draft. App. 14. An identical superseding indictment was filed November 17, 1982,[1] App. 15, and the earlier indictment was dismissed. Dkt. 42.

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[1] The superseder corrected the typed date on which the defendant's failure or refusal to register was said to have begun from "August 3, 1981" to "August 3, 1980." On the original indictment, the 1981 date was changed to 1980 by hand, with the U.S. Attorney's initials, but not the grand jury foreperson's, appearing by the change.

Mr. Kerley represented himself throughout the pretrial and trial phases of this case.

Mr. Kerley filed a number of motions, including an extensive discovery motion.[2] On January 1, 1983, the Magistrate (Hon. William Gansner) granted an evidentiary hearing on Mr. Kerley's motion to dismiss for selective prosecution based on First Amendment activity. Dkt. 73.3.

The Magistrate took this and other issues under advisement. Magistrate Gansner's Report and Recommendation on all but two of the pending motions was filed October 25, 1983; Dkts. 136-138. He ruled on the discovery question and the government's motion to reconsider the grant of an evidentiary hearing on October 27. The Magistrate recommended dismissal of the indictment on account of invalid promulgation of the governing regulations, granted the contested discovery, and denied the government's motion for reconsideration. Otherwise, he recommended denial of all dispositive motions.

On November 2, the government requested judicial review of the Magistrate's order; Dkt. 141. Both parties filed objections

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[2] Among these motions were several relevant to this appeal: the Motion to Dismiss for Failure to Allege a Crime, Dkt. 17; App. 16; Motion to Dismiss for Absence of Criminal Intent, Dkt. 25; and a Motion to Dismiss for Violation of Right Against Self-Incrimination, Dkt. 47; App. 17. Also included was a motion to permit photographing and broadcasting of the trial and other proceedings. Mr. Kerley attempted to appeal the Magistrate's denial of the motion to permit photographing; Dkts. 73.1, 75. Mr. Kerley requested, but then withdrew, a stay of proceedings pending that appeal. Dkt. 74; Conf., Jan. 14, 1983. This Court dismissed that appeal on jurisdictional grounds on April 26, 1983. Dkt. 134; see United States v. Kerley, 753 F.2d 617, 618 (7th Cir. 1985); see also note 3 infra.

to the Report and Recommendation on November 4; Dkts. 143, 144. The Honorable James E. Doyle, Sr.U.S.D.J., stayed the discovery order, and established a new briefing schedule. Dkts. 145, 146.[3] On August 10, 1984, Judge Doyle denied all the dispositive motions. Dkt. 169. On August 16, he affirmed the magistrate's discovery order. The government refused to comply, and on September 18, 1984, the district court granted the defendant's motion to dismiss as a sanction under Fed.R.Crim.P. 16(d)(2). The government then appealed. Dkt. 174.

This Court delayed the briefing of the government's appeal pending the decision in Wayte v. United States, 470 U.S. 598 (1985). The appeal was argued on March 4, 1986, and decided on April 3. Dkt.No. 84-2753, reported at 787 F.2d 1147. The mandate, reversing the dismissal and remanding for trial, was returned on May 5, 1986. Dkt. 195.

At a status conference on May 21, 1986, Judge Doyle established the first trial date to be set in the case: June 30, 1986. Dkts. 196, 197. The court also granted leave for the defendant to file three additional motions, which were filed on June 4, 1986. One of these was a motion to dismiss for violation of the Speedy Trial Act, Dkt. 205, which was soon amended

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[3] On December 21, 1983, Mr. Kerley sought judicial review of the Magistrate's order denying his request for photographing and broadcasting of the the proceedings. Dkt. 154. Review was denied, Dkt. 156, and he filed a Notice of Appeal on January 3, 1984. Dkt. 157. That case was docketed in this Court at No. 84-1026; the order was affirmed on February 26, 1985; reported at 753 F.2d 617.

to add allegations of violation of the Military Selective Service Act's special speedy prosecution clauses and of Fed.R. Crim.P. 48. Dkts. 228, 230. The district court denied the motions based on pre-indictment delay and for failure to allege a crime (raising the continuing offense issue briefed below) on June 13, 1986. Dkts. 223, 224; App. 73-77. The speedy trial motion was denied on June 25. Dkt. 243.

At the same time, the district court turned its attention to the remainder of Mr. Kerley's discovery motion. Discovery items relating to Selective Service's computer system were granted, with a few exceptions, on June 25, 1986, Dkt. 245, requiring the government to make compliance in four installments. The prosecutors sought reconsideration of the discovery order by motion on August 1, 1986, after the final deadline for compliance had passed. Dkt. 263. Filing of briefs and affidavits concerning the government's motion for reconsideration continued through September 26, 1986.[4]

The government and defendant filed proposed jury instructions on June 25, 1986. Dkts. 236, 239; App. 83-106. At that time the government also moved to modify the indictment to delete as surplusage the words "and willfully." Dkt. 254. No ruling on pending matters had been made by mid-March, 1987, when the case was transferred to the docket of Judge Shabaz. Judge Doyle died on April 1, 1987.

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[4] Although the filing of the final affidavit was late, the court granted the defendant's motion to receive it. Dkts. 285, 287.

Judge Shabaz held a status conference on March 31, and set a definite trial date of April 20, 1987. Dkt. 288. Mr. Kerley filed one additional request to charge on April 8, concerning the corpus delicti rule requiring that an admission not be deemed sufficient evidence unless corroborated. Dkt. 290; App. 107-08. On April 6, 1987, Judge Shabaz heard argument on the government's pending motion for reconsideration of discovery. On April 8 and 9, the court issued orders denying the defendant's motion to exclude the computer evidence on reliability grounds, but granting partial discovery subject to a protective order. Dkts. 291, 193.

Mr. Kerley renewed his motion to dismiss on speedy trial grounds on April 15, 1987. Dkts. 295, 298. U.S. Magistrate James Groh, Jr., at a final pretrial conference held April 15, ruled, over the defendant's objection, in favor of the government's jury instructions on intent and rejected the defendant's request for a corpus delicti instruction.[5] App. 109-17 (conf. mem.) The Magistrate also recommended denial of the speedy trial motion. Dkts. 300-304. At a hearing held Friday, April 17, Judge Shabaz resolved all remaining discovery disputes and denied the renewed speedy trial motion.

Following a one and a half day jury trial commencing Monday, April 20, during which the judge charged in accordance

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[5] The Magistrate, contrary to the requests of both parties, App. 86, 97-98, also consolidated the prohibited act and criminal intent elements into a single element for instructional purposes. App. 123.

with the Magistrate's rulings,[6] App. 130-37, the jury returned a verdict of guilty. Dkts. 305-307. On May 29, 1987, the court imposed a sentence of three years' imprisonment and a $10,000 fine.[7] Dkt. 312; App. 145-49, 156. This appeal followed with the timely filing of a Notice of Appeal on June 1. Dkt. 314; App. 159.

b. Statement of Facts

Gillam Kerley was born a male in the United States on January 8, 1961. Gov't Exh. 10 (birth certificate); rec'd by stip., Tr. 2A-4.[8] Under a Presidential Proclamation issued in 1980, those born in 1961 were to have registered during the eight-day period preceding August 3, 1980. Pres.Proc. 4771, ¼1-103. Compare Tr. 1-36 (government's expert witness stated that

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[6] The defendant renewed his request for a corpus delicti instruction at the conclusion of all the evidence. Tr. 2A-59 to -60. The court instead offered to give an instruction on the theory of the defense, Tr. 2A-61, which Mr. Kerley then drafted and the court delivered. 2B-3 to -5, -42 to -43; App. 132-33.

[7] The court subsequently ordered that payment of the fine need not commence until Mr. Kerley's release from confinement, thus, in effect, amending the sentence. Order, June 19, 1987. App. 155. An order respecting security for a stayed fine was entered July 1, pursuant to 18 U.S.C. § 3624. App. 157-58. Following denials of release pending appeal by the district court and a panel of this Court, the defendant voluntarily surrendered on July 10, 1987, to commence service of his sentence. On July 17, 1987, release pending this appeal was also denied, without opinion, by the Circuit Justice.

[8] His full name given at birth is "David Gillam Kerley." Id. The names of the parents on the birth certificate are those the defendant gave the U.S. Marshal when he was processed upon indictment. Exh. 2.

those born in "1981" were to register "during an eight-day period ending August 3, 1980.") During this time period, Mr. Kerley resided in Dane County, within the Western District of Wisconsin. Exh. 11; Tr. 2A-9, 2A-17.

Laurie Stoffel, a "supervisory contact representative" with the Selective Service System, testified that she searched the Selective Service registrant data base about a dozen times between May 1982 and the week prior to trial for an indication that Mr. Kerley had registered, using his name, and variations thereon, as well as his date of birth and Social Security Number, but was unable to locate any information. Tr. 1-17 to -25. On cross-examination, she conceded that such a search would not locate information from a registration certificate which for some reason had never been entered into the data base, Tr. 1-22 to -23, that there were plausible misspellings or misreadings of Mr. Kerley's name (such as "Harley") that she had not searched for, Tr. 1-22, and that on occasion a person would write to Selective Service claiming to have registered and his name could not be located in the data bank. Tr. 1-22 to -23.

Kenneth L. Johnsen, the Selective Service System's Associate Director to Information Management, described the registration process and the SSS data management system. Government Exhibit 12 was a copy of the registration form (SSS Form 1), with eight blocks of information to be filled in by a registrant at any of 35,000 Post Offices. Each Friday, each Post Office is to send filled-in cards to Selective Service.

The information is then entered into the SSS data base, which computer-generates an Acknowledgement/Change Form, containing a Selective Service Number and all information form the Form 1 and is sent back to the registrant. Tr. 1-25 to -30. Johnsen testified that of 2.3 million change forms Selective Service had received back, not one related to a person whom his staff could not locate in the data base. Tr. 1-31. He also testified that of millions of letters sent to possible nonregistrants, many responded that they were already registered, yet this could not be verified on the data base. Tr. 1-35.[9] Mr. Johnsen conceded that Selective Service had no control over the Post Office, and that the only record of how many men had signed up at Post Offices was the weekly Form 6 with which those cards were to be transmitted to SSS. Tr. 1-44.

On cross-examination, Mr. Johnsen was asked about various opportunities for error in the processing of draft registration records. He agreed that Selective Service does not attempt to control how particular Post Offices handle filled-out cards prior to assembling them to be sent to Selective Service. These cards are to be sent by ordinary mail, their receipt is not acknowledged, and no record of who has registered or the number

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[9] The government also offerred in evidence Mr. Johnsen's certificate dated July 28, 1986, that Ms. Stoeffel performed a search at his requst and concluded that "a certain Gillam Kerley or David Gillam Kerley ... date of birth of January 8, 1961, was not registered." Tr. 1-38 to -39. The defendant's objection, Tr. 1-39, was taken under advisement and ultimately sustained. Tr. 1-131, 2-A-4, 2-B-6.

of registration cards sent in is to be kept at the Post Office. The only record of how many cards have been transmitted is the Form 6, which is packaged with the cards themselves, so that if one is lost, all are lost. Tr. 1-47 to -49. Mr. Johnsen also described in detail the batching and numbering process for cards received at Selective Service, and how the data from each card received is keyed twice to verify accuracy. These workers, however, are evaluated for speed and on-machine time. Tr. 1-50 to -69.

When a person sends in a change of information (usually a change of address) on Form 2, which is available in Post Offices, and that name cannot be found on the data base, it is treated as a new registration. Mr. Johnsen did not know how many cases of this kind there were, but thought it would be less than half of the hundred thousand such cards sent in. Tr. 1-72. Of the 2.3 million Form 3B's returned by registrants, he had no record of how many were changes of information and how many were corrections of Selective Service errors. Tr. 1-78. Between 1980 and 1986, Selective Service's computer caught about 500,000 validation errors, about 337,000 of them invalid years of birth. Tr. 1-88 to -89. If a registrant did not respond to two letters seeking verification and correction of invalid information, that name was moved into the microfiche records, but not entered into the data base. Tr. 1-90. A 1982 General Accounting Office study of the early years of the registration process indicated a 5% error rate in Selective Service information. During that

time period (1980-1981) the coding had been done by a private contractor and the keying by IRS and Social Security workers, not by Mr. Johnsen's Selective Service operation. Tr. 1-94 to -100. When sampling is done currently to determine the existence of errors or problems, no record is kept. Tr. 1-98.

Selective Service instituted a program of computer matching with driver license and similar records to locate possible nonregistrants. Of about 650,000 responses to inquiries by Selective Service to such people which stated that the man had indeed registered, about 277,000 were then confirmable as being on the data base, but almost 369,000 claims of having registered (about 57%) could not be confirmed. Tr. 1-105. If such a person responded with sufficient information, he was simply entered on the data base as a new registrant; there were tens of thousands of these. Tr. 1-110 to -112. Exhibit 8 was a response by the defendant to such a letter, dated Nov. 19, 1982, stating that he had not registered due to a "condition beyond my control." Tr. 1-103; 2-B-14; App. 80.

In 1985 a batch of registration cards from 1981 which had never been entered on the data base by the former private contractor was located by Selective Service in Washington, D.C. In 1984, a batch of registration cards which had not been fully processed was retrieved from a "destruction gurney" at the data center. On another occasion, several trays of compliance verification letters fell out of the back of a mail truck into the street. Tr. 1-112. If a batch is determined to be missing

a card in sequential numbered order, and that card cannot be located, Selective Service procedure is simply to insert an as-yet-unprocessed card in the space to fill the gap. Tr. 1-128.

The government rested its case after calling two FBI agents. One testified that on July 6, 1982, he met with Mr. Kerley at the Federal Building where he handed Mr. Kerley a letter (Exh. 4) informing him of his obligation to register and Mr. Kerley handed the agent a written statement of his own (Exh. 5); App.78. At that time the agent also gave Mr. Kerley a blank registration card and mailing envelope. Mr. Kerley did not admit either that he was required to register or that he was not registered. Tr. 2A-9, -11 to -12. On July 23, 1986, the defendant voluntarily provided this agent with handwriting exemplars (Exh. 6). Tr. 2A-10, -22. The other agent, a questioned document examiner, confirmed on the basis of these exemplars that Exhibits 7, 8, and 9 (App. 79-81) were letters addressed to the Director and General Counsel of the Selecti e Service System signed by the defendant. Tr. 2A-13 to -15. It was stipulated that these letters were received by Selective Service shortly after the dates stated therein, to wit, September 1, 1981, December 28, 1981, and March 8, 1982, respectively. Exh. 1A.

The defendan t did not testify, but did call two witnesses. The first, Paul Knapp, Deputy General Counsel of Selective Service since December 1980, testified that his office received many letters from individuals stating that they had not regis-

tered and/or would not register for the draft. He said that such letters (as contrasted with letters about suspected nonregistrants received from third parties) were "invariably" from people who should indeed, legally, have registered. He was aware of no such letters which were determined to be from persons who were actually registered or were not subject to registration. Tr. 2A-35 to -38.

Marian Neudel,[10] an attorney in private practice in Chicago and former Assistant Regional Counsel for EPA in Chicago, was qualified by the lower court as an expert in draft counseling and the anti-draft movement, based on her 15 years' experience in that field. Tr. 2A-40 to -41, -52. She testified that in the summer of 1980 she had written a pamphlet discussing the legality of various tactics of opposition to the draft and draft registration, including what she called "hyper-compliance," such as the writing of letters announcing a refusal to register by persons who either were in fact registered or who were not required to register. She testified that she had personal knowledge that a substantial number of people had written such letters to Selective Service. Tr. 2A-44 to -46. She stated that she had known the defendant since 1980, and could not remember whether she had assisted him in drafting any of his letters to Selective Service. Tr. 2A-58.

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[10] This witness's first name is misspelled "Marion" in the transcript.

Based on her experience in the anti-draft movement as well as her former employment as an Assistant Federal Public Defender, she stated that such false admissions were more common in draft violations than with respect to almost any other crime, and might have numbered as many as one in every fifty apparently self-incriminating letters sent to Selective Service. She said that a person might have any of several motivations in sending such a letter: to learn through observing the System's response about the mechanics of the enforcement program, to burden and "gum up" Selective Service compliance efforts, or to demonstrate "solidarity" with conscientious nonregistrants by sharing or diluting their risk. Tr. 2A-47 to -58.

At sentencing, Judge Shabaz made specific comments on two of the many letters (one from a teacher; one from a minister) sent to the court in Mr. Kerley's support and general comments on others. Tr. 11; App. 145. The district court then stated that it viewed its task as choosing between a one year and a three year sentence of incarceration, remarking that while the actual time served on those sentences would not differ significantly, the period of subsequent parole would. The court chose the longer term, it explained, for purposes of controlling Mr. Kerley's future anti-draft activities. Tr. 12-13; App. 146-48. Specifically, the court stated:

> the higher period of of sentence is appropriate because the Court believes that there is the encouragement of the Defendant to others to violate, as perhaps is indicative of [sic] his position as the executive director of the Resistance Movement [sic] at I believe $500.00 per month.

> And, it would appear that from the comments of the Defendant and those portions of the Presentence Report that it is his continued desire to actively and perhaps illegally oppose those laws without resorting to appropriate legislative action, which he could so very well do based upon his tremendous abilities.
>
> And so, in order to deter the Defendant from his continued illegal activity and his aiding and abetting those others who may follow in his footsteps, ... the Court has determined that the higher sentence is the appropriate sentence ....
>
> ... the Court believes that the supervision which will be provided will thwart his illegal activities directed at the system, and will thwart his attempts and his ability to aid, abet and encourage others during that period of parole to violate the laws.

Tr. 12-13; App. 146-47. The court also imposed the maximum fine allowed by law, $10,000, "for the incalculable expenses pursued by the Government's pursuit of this conviction." Tr. 14; App. 148.[11]

Mr. Kerley immediately objected that there was nothing in the Presentence Report or presented by the government to suggest that he had unlawfully encouraged anyone to violate the draft law. He also pointed out that his employer, the Committee Against Registration and the Draft, was a federally tax-exempt "eductional organization which does not aid, abet, [or]

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[11] The court also stated that the maximum fine was appropriate because the defendant's "family's financial resources does [sic] indeed provide him the luxury to choose to be under-employed based on the ready ability of the family to provide that support and financial assistance." Id. As Mr. Kerley is 26 years old and single, it appears that by "the family" the court meant the defendant's parents.

encourage non-registration." The court declined to correct or reconsider the sentence on that basis. Tr. 14-15; App. 148-49.

At a hearing held June 19, 1987, in connection with the defendant's motion for release pending appeal, Judge Shabaz reiterated his reasons for the prison sentence. Tr. 25-26; App. 151-52. At the same time, he modified his explanation for the fine, as well as its terms. The court stated:

> The defendant up to now has had the luxury to choose to be underemployed and to restrict and withhold his income potential as the result of the support that he has received and the continuing support from his family. The Court believes that this income potential is such that the $10,000 fine is indeed minimal when examining the qualifications, the experience, and the tremendous abilities of this defendant.

Tr. 26; App. 152.

ARGUMENT

I. THE TRIAL COURT'S CHARGE TO THE JURY ON THE ELEMENTS OF THE OFFENSE WAS ERRONEOUS.

At the government's request, and over the defendant's objection, the Court instructed the jury as follows concerning the elements of the offense of nonregistration for the draft under 50 U.S.C. Appx. § 453, 462(a):

> Two essential elements are required to be proven in order to establish the offense charged in the indictment. First, that the defendant at the time charged in the indictment had a legal duty to register with the Selective Service, and second, that the defendant knowingly failed, evaded, or refused to register.

Tr. 2-B-43; App. 133. The instructions also stated: "Section 462(a) of Title 50 of the United States Code Appendix prohibits in part the knowing failure, evasion, or refusal to register with the Selective Service System by a person having a legal duty to register." Id. at 2B-44; App. 134. In pertinent part, 50 U.S.C. § 462(a) provides:

> any person ... who otherwise [than by knowingly making a false statement] evades or refuses registration or service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made prusuant to this title [shall be punished].

In its instructions on the elements of the offense, the court erred in two fundamental ways: by misstating the scienter element; and by stating that there were only two, rather than three, elements to the offense. For each of these reasons, or on account of their combined effect, reversal is required.

A. The Trial Court Erred in Failing to Require that the Jury Find Specific Intent to Violate a Known Legal Duty.

In the instructions quoted above, the court made clear to the jury that the only intent they need find was that the defendant acting "knowingly." The court defined "knowingly" as follows:

> When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.

Id. at 2B-46; App. 136. This latter language comes directly from § 6.04 of the Federal Criminal Jury Instructions of the Seventh Circuit (1980) ("Bauer Report"), for use where the statute prohibits certain conduct done "knowingly," does not use the term "willfully," and caselaw does not require otherwise.

The defendant's request on this issue, by contrast, was for the District Court to charge the jury that conviction required proof of a specific intent to violate a known legal duty. This was in accordance with a 1972 precedent of this Court and the unanimous caselaw of all of the other Circuits which have addressed the question of the proper definition of the mental element under 50 U.S.C. Appx. § 462(a), the criminal penalties provision of the Military Selective Service Act. Defendant's Prop. Inst. No. 17; App. 99-100. The refusal of the defendant's request and granting of the government's was reversible error.

In United States v. Borkenhagen, 468 F.2d 43, 50 (7th Cir. 1972), cert. denied, 410 U.S. 934 (1973), this Court clearly

stated the mental element of an offense under 50 U.S.C. Appx. § 462(a), the same provision involved here, to be as Mr. Kerley had requested. The defendant in that case refused induction when the commanding officer of the Armed Forces Entrance and Examining Station declined to read and sign a letter purporting to absolve the defendant from liability for war crimes on account of his submission to military service during the Vietnam War. A panel consisting of Judges Cummings, Fairchild and Stevens affirmed the conviction notwithstanding the trial court's refusal to give a proffered instruction on the theory of the defense, reasoning that the same point was covered by other instructions. Among those instructions, which this Court approved and found "complet[e]," 468 F.2d at 51, the trial court explained that acting "willfully" was an element of the offense, defining this term as requiring "knowledge that the omission 'was prohibited by law and with the purpose of violating the law and not by mistake, accident or in good faith.'" Id. at 50.

The instruction approved in Borkenhagen is universally deemed to be a correct interpretation of the criminal intent requirement under the Military Selective Service Act. The unanimous caselaw of the Circuits which have considered the question concludes that knowledge of one's legal duty, coupled with an intent to violate that law, is an element of the offense. See, e.g., United States v. Klotz, 500 F.2d 580, 581-82 (8th Cir. 1974) (per curiam); United States v. Williams, 421 F.2d 600, 602

(10th Cir. 1970); United States v. Boardman, 419 F.2d 110, 114 (1st Cir. 1969), cert. denied, 397 U.S. 991 (1970); United States v. Krosky, 418 F.2d 65, 67-68 (6th Cir. 1969); Harris v. United States, 412 F.2d 384, 388 (9th Cir. 1969); United States v. Rabb, 394 F.2d 230, 231-32 (3d Cir. 1968); Whitney v. United States, 328 F.2d 888 (5th Cir. 1964) (per curiam); United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943) (Clark, J.). The Sixth Circuit has reiterated that standard very recently in a Selective Service nonregistration case. United States v. Schmucker, 815 F.2d 413, 421 (6th Cir. 1987) ("The term 'willfully' ... require[s] proof of ... an intentional violation of a known legal duty.")

When nonregistration for the draft or failure to submit to induction is alleged, the offense lies in "evad[ing] or refus[ing]" (§ 462(a)) a purely malum prohibitum regulatory duty, much as in tax cases. In United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam), the Supreme Court held that the mens rea for tax evasion is the voluntary, intentional violation of a known legal duty. This is an entirely reasonable construction of the draft statute as well. The statutory terms "evades or refuses" suggest just such a specific intent. One would not be said to be "refusing" or "evading" a duty he did not know of simply because he did not perform it. Cf. 50 U.S.C. Appx. § 465(a) (attempting to legislate presumption of knowledge of duty, a provision which Congress could not have thought necessary if knowledge were not required).

Indeed, the Solicitor General has conceded before the United States Supreme Court that the appellant's, not the District Court's, is the correct definition of intent in a Selective Service nonregistration case. See Government's Brief in Opposition, United States v. Sasway, No. 83-2098, at 8 ("The nonregistration statute [citation omitted] requires the government to prove that the defendant, with knowledge of his obligation and the intent not to comply, 'knowingly' did not register as required by law." [Citing, inter alia, Pomponio, supra].)

This Circuit's Bauer Committee made quite clear, as any drafters of model instructions must, that its recommended jury charges were not to be deemed to change the substantive law of any federal offense, but only to assist in articulating definitions of those elements once they had otherwise properly been identified. See Bauer Report, at 79-87; cf. id. at v (West ed. 1980) (Judicial Council's letter authorizing publication of Bauer Report: "[W]e cannot and do not approve in advance the instructions given in any particular case."). For this reason, the government's reliance below on the Bauer instruction as authority to resolve what is a question of substantive law was inappropriate.

Likewise, United States v. Liparota, 735 F.2d 1044 (7th Cir. 1984), relied upon below by the government as the sole caselaw support for its June 1986 request to charge and presented to a panel of this Court during July 1987 in opposing Mr. Kerley's motion for bail pending appeal, is no authority for

the charge given in this case. That decision, which involved a prosecution for trafficking in food stamps in violation of 7 U.S.C. § 2024(b), was reversed on this very point by the United States Supreme Court in May 1985. Liparota v. United States, 471 U.S. 419 (1985). If, as the United States has argued in this case to date, Liparota is controlling, then the instruction given here, which is the same as was delivered in that case (Bauer § 6.04), was reversible error.

In the Liparota decision, the High Court gave several reasons for concluding that knowledge of the legal requirements must be proved which are equally applicable here: "the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from th[e] background assumption of our criminal law" that it is; "to interpret the statute otherwise would be to criminalize ... apparently innocent conduct" (such as being 18 and male and knowing one had not given one's name and address to the military departments of the government); and the rule of lenity. Like unauthorized use of food stamps, nonregistration for the draft is not a "public welfare offense." Compare United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971) (knowledge of law not required where person chooses to deal with dangerous materials highly likely to be regulated). Indeed, the food stamp statute does not even employ words connoting purposefulness such as "evades or refuses." Nor is it the subject of more than forty years' unanimous caselaw in nine or more

circuits requiring an intentional violation of a known legal duty. This case, even more clearly than Liparota, is one in which Bauer § 6.04 should not have been given.

The government has argued, in opposing bail pending appeal, that the instruction actually given here was sufficient to convey a correct understanding of the statutory requirement of guilty knowledge. This position is untenable. The Bauer Report itself states that the instruction used in this case "should not be interpreted to mean that the defendant must necessarily know that his conduct violated federal law." Id. at 86. The instruction here plainly was concerned with knowledge of the facts, not of the law. The jurors, unless instructed otherwise, would likely apply their common "knowledge" that "ignorance of the law is not an excuse." But under this unusual statute, lack of knowledge of the legal obligation (although not ignorance that the obligation is criminally enforceable) is an excuse. Where an instruction to the jury on an element of the offense could have been taken by the factfinder in either of two ways, one of which misstates an element, the appellate court will reverse, not affirm on the theory that the jury might not have taken the instruction at face value. Sandstrom v. Montana, 442 U.S. 510, 525-27 (1979).

None of the statements and letters authored by Mr. Kerley and offered in evidence against him at trial admitted guilty knowledge[12] and the defendant did not concede it in his closing

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[12] The prosecutor quoted the most nearly incriminating parts of the letters during his closing argument. None contains a clear admission; all are indirect in their phraseology. See App. 78-

argument. Tr. 2B-19. The prejudice was enhanced by the inclusion in the indictment of the questionable allegation that the defendant, in addition to being charged with evasion and refusal, was also accused of "fail[ing]" to submit to registration" for the draft. App. 15. The statute, in its direct reference to registration, punishes only one who "evades or refuses." The word "fail" comes from a later, catchall phrase, as quoted above, and is arguably inapplicable to a nonregistration case.[13] This term lacks the same willful connotation as "evade" or "refuse" and so, in combination with the mere knowledge charge, could have misled the jury into assigning insufficient significance to the government's burden of proving criminal intent. The error in the instructions was thus not harmless, and a new trial must be awarded.

B. The Court Erred in Failing to Instruct the Jury that the Required "Mens Rea" Is a Separate Element from the Prohibited "Actus Reus."

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82. The most favorable to the prosecution stated, "During July, 1981, I reached a decision not to register for the draft." See Tr. 2B-14; see also 2B-29 to -30 (defendant reads entire letter to jury during argument). It must be noted that Mr. Kerley's time to register was in July 1980, not 1981. Cf. note 13 infra.

[13] This contention, not pressed below and thus not asserted here as a separate ground for reversal, is well supported by logic and principles of statutory constuction. First of all, the specific clause should supersede the general. And second, it makes good sense to require strict proof of knowledge of the obligation before punishing criminally one who has not yet registered and therefore is not "on the mailing list" to receive warnings and advice of his obligations. Once a man is registered and thus knows he is part of the system, it is less unjust to punish him simply for knowingly failing to perform a duty.

As quoted above, the court charged, as suggested by the Magistrate, that there were only two elements to the offense of nonregistration. The court thus collapsed into one what both parties below recognized were separate requirements of proving the prohibited act (or omission) and the accompanying criminal intent (or knowledge). In doing so, the court seemed to reduce by one third the number of propositions that had to be proved beyond a reasonable doubt, thus lightening substantially the government's burden of proof. Mr. Kerley mounted separate defenses to these two elements (having conceded the third, being a person obligated to register). Although no objection was lodged below, so fundamental a misstatement of the elements of an offense is ordinarily considered to be plain error under Fed.R.Crim.P. 52(b). Pipefitters Local 562 v. United States, 407 U.S. 385, 440-42 & n.52 (1972); United States v. Clark, 475 F.2d 240, 250 (2d Cir. 1973). Thus, for this reason as well, a new trial should be ordered.

II. THE COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT AND IN CHARGING THE JURY ON THE THEORY THAT REFUSAL OR EVASION OF DRAFT REGISTRATION IS A CONTINUING OFFENSE.

Under the applicable Presidential Proclamation, a person born in 1961 was required to register on any of the six days beginning July 28, 1980.[14] The court below instructed the jury

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[14] The District Court erroneously instructed the jury that the defendant (if born in 1961, as the uncontradicted evidence showed) was required to register during July 1981. Tr. 2B-46; App. 136. This had the effect of seeming to bring closer together the dates of the defendant's alleged dereliction with the dates of the letters that offered against him as evidence of his guilty knowledge. Cf. Tr. 1-36 (government's expert witness also misstates who was to register when); Tr. 2B-45; App. 135 (court charges correctly).

that failure to register for the draft constitutes a "continuing offense," thus extending by over two years -- to the date of indictment -- the time frame during which the defendant could be convicted for having had guilty knowledge. Tr. 2B-46; App. 136. The defendant had moved to dismiss the indictment for charging the offense in continuing terms (and in limine on the same theory), App. 16, 18-19, and requested instructions in accordance with his non-continuing view of the offense. App. 102.

The "continuing offense" issue in Selective Service nonregistration cases arises because of an ambiguous Congressional response to the decision in Toussie v. United States, 397 U.S. 112 (1970). There, the Court held that failure to register for the draft was not a continuing offense. The Court noted that "the doctrine of continuing offense should be applied in only limited circumstances" (id. at 115) and defined as follows the test of whether an offense should be construed as continuing:

> [S]uch a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Id. The Court found no such explicit language in the Military Selective Service Act and concluded, "There is also nothing inherent in the act of registration which makes failure to do so

a continuing crime." Id. at 122. Under the facts of Toussie, the consequence of this ruling was a dismissal on statute of limitations grounds, as Toussie had been indicted more than five years after the end of the registration period defined in the applicable Presidential proclamation.

Dissatisfied with the result in Toussie, Congress could have amended the Act to create a continuing offense of failure to register. It did not. Instead, Congress amended 50 U.S.C. Appx. § 462(d) to delay the accrual of the statute of limitations. As amended, that section now provides that a nonregistrant may be prosecuted for up to five years after his twenty-sixth birthday, "or within five years next after the last day before such person does perform his duty to register, whichever shall first occur." The District Court relied on the reference in the statute to "duty to register" in concluding that the amendment mandated that nonregistration be treated as a continuing offense.

The indictment in this case did not charge Mr. Kerley with refusing and evading registration during the required period, nor did the judge charge the jury that it must find refusal or evasion during that "time or times" in order to convict. The "duty to register" mentioned in § 462(d) is obviously that described in 50 U.S.C. § 453(a), which provides:

> Except as otherwise provided in this title it shall be the duty of every male citizen of the United States ... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteeen and twenty-six, to present himself for and submit to registration at such time

> or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. (emphasis added)

The "time or times" prescribed in Presidential Proclamation 4771 for those born in 1961 was a particular six day period in late July and early August 1980. Nothing in the Proclamation or in any regulation "hereunder" imposed a duty on him to register at any other time. Compare Proc. ¶1-109 (explicitly imposing duty to register late on certain persons not arguably including Mr. Kerley). Thus, the plain language of the statute, Proclamation and regulations still does not support the continuing offense theory and more than it did when Toussie was decided.

The post-Toussie amendment cannot be said to lead to the conclusion that nonregistration is now a continuing offense unless one rejects two unimpaired doctrinal predicates of that opinion. One is that a continuing duty, in law, does not necessarily imply a continuing offense of failure to comply with that duty. (The Toussie Court expressly declined to invalidate a Selective Service regulation which then existed, but no longer does, declaring a continuing duty to register. 397 U.S. at 119-21.) The other is that a crime may continue for one purpose (e.g., statute of limitations, as in Toussie) and not for another (e.g., venue, or simultaneity of act and intent, as here). See id. at 120-21 n. 16. There is nothing in the amendment of the draft law's statute of limitations, serving to "overcome the result" in Toussie (Sen. Comm. on Armed Services, Rep. No. 92-93, 92d Cong., 1st Sess., at 22 (1971)), that can be

interpreted as overturning its legal premises. Although the duty now "continues," in a sense, for statute of limitations purposes, the offense does not, for the purpose of defining the time during which the prohibited act and intent must coincide.

The construction of the statute adopted by the court below would render it unconstitutional under the Fifth Amendment's self-incrimination clause.[15] The Supreme Court found it unnecessary to address this contention in Toussie, being persuaded in any event that nonregistration was not a continuing offense. If it be held that Congress intended to create a continuing offense of nonregistration for act-and-intent purposes, as is involved here, then the constitutional issue cannot be avoided.

As interpreted in recent Supreme Court's cases, the Fifth Amendment may be said, in short, to prohibit any compulsion of testimonial self-incrimination. See Fisher v. United States, 425 U.S. 391 (1976). It is settled by the unanimous judgment of the Supreme Court that the identifying information -- including date of birth and date of registration -- which the government seeks in the course of draft registration is both "testimonial" and potentially incriminating in a prosecution for late registration, because it tends to establish when the person should have registered and that he did not. See Selective Serv. Syst. v. Minnesota PIRG, 468 U.S. 841, 856-59 (1984); id. at 862

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[15] Mr. Kerley filed a motion to dismiss on this ground. App. 17.

(Brennan, J., dissenting); id. at 866-75 (Marshall, J., dissenting). The only real question is whether this testimonial self-incrimination is "compelled" under the continuing offense theory.

The Second Circuit's Toussie opinion relied upon the government's concession that only one prosecution could be brought for a continuing refusal to register, in holding that Toussie's "inaction did not give rise to the threat of punishment beyond that he had already risked. ... Toussie was not being put to a cruel choice that the privilege is designed to avoid." 410 F.2d 1156, 1160 (2d Cir. 1969), adopted, 397 U.S. at 133 (White, J., dissenting).[16] The "compulsion" of a criminal statute in and of itself is surely enough to implicate the Fifth Amendment: it threatens punishment is certain conduct is not avoided. But even if that were not generally so, there would be Fifth Amendment compulsion in the criminal enforcement of a continuing duty. The "compulsion" to register during the Proclamation period is not relevant to Fifth Amendment analysis, because it is not compulsion to self-incriminate. After those six days pass, however, the Amendment's protection comes into

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[16]This was also Judge Doyle's basis for denying the motion. App. 77. It is no longer clear that this factual premise remains valid. In a letter disclosed to the defense during discovery in this case and made part of the record below, the Chief of the General Litigation and Legal Advice Section of the Justice Department's Criminal Division opined that "in our view the failure to register is a continuing offense. Consequently, a person could be prosecuted a second time if he continued to refuse to register." Letter (Aug. 22, 1982) to U.S. Attorney, Central District of Illinois. App. 22.

play for the first time, just as the privilege revives upon expiration of a grant of immunity. See Pillsbury Co. v. Conboy, 459 U.S. 248 (1983). The continuing threat of criminal punishment, carrying a steadily increasing risk of prosecution and conviction, must suffice. The cost of compliance with the "continuing duty" may be provision of evidence sufficient to turn a nonexistent (because unknowing) or legally inadequate case of criminal nonregistration into a proven felony. This should make the duty criminally unenforceable under the Fifth Amendment's self-incrimination clause.

The continuing offense issue recently commanded the attention of the Eighth Circuit en banc and was resolved in that Court by a slim 5-4 vote. Compare United States v. Eklund, 733 F.2d 1287, 1295-1302 (8th Cir. 1984) (en banc), with id. at 1303-06 (Lay, Ch.J., with Heaney, McMillian & Arnold, JJ., dissenting). See also United States v. Martin, 733 F.2d 1309 (8th Cir. 1984) (en banc) (also presenting Fifth Amendment argument, as advanced here; same 5-4 division), cert. denied, 105 S.Ct. 1864 (1985) (in tandem with Eklund). For the reasons discussed by the four Eighth Circuit dissenters, as well as those presented above, the district court erred in allowing this case to go to the jury on a continuing offense theory.

Because nonregistration is no more a continuing offense now than it was when the Supreme Court decided Toussie, the indictment in this case failed to charge an offense. It alleged that Mr. Kerley knowingly "failed, evaded and refused to register"

from August 3, 1980, to the date of the indictment. App. 15. The correct legal question, however, is whether he willfully refused between July 28 and August 2, 1980, inclusive. Later acquisition of guilty knowledge could not make him a criminal, although it could, for example, disqualify him civilly for federally-funded student financial assistance. 50 U.S.C. App. § 462(f); SSS v. MPIRG, supra. The conviction should be overturned and the indictment dismissed without prejudice.

Even if the indictment is somehow sound, however, the court's instructions erroneously explicating the continuing offense theory require a new trial. The point has not been waived; Mr. Kerley filed a motion to dismiss the indictment on this basis, and he requested proper jury instructions. The continuing offense instruction was given over his objection lodged, in accordance with local procedure, at the charging conference. Moreover, presenting this case to the jury on a continuing offense theory was prejudicial to the defendant. A lack of proof of culpable intent was the basis for the defendant's mid-trial motion for judgment of acquittal under Fed.R.Crim.P. 29, Tr. 2A-18 to -19, and was raised again in closing argument. Tr. 2B-19.[17] The letters to Selective

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[17] Moreover, during July and August 1980, there was legitimate confusion concerning whether the draft registration program was legally enforceable, in light of an injunction issued in the Eastern District of Pennsylvania and Justice Brennan's stay of that order. Rostker v. Goldberg, 448 U.S. 1306 (1980). The lower court's injunction was not reversed until the spring of 1981. Rostker v. Goldberg, 453 U.S. 57 (1981). During that interim, criminal intent would have been harder to prove. Cf. Point III of this Brief, infra.

Service officials from the defendant which were offered against him were dated between September 1981 and March 1982. Although reversal would be required simply because it is not possible now to say whether, under the instructions given, the jury found guilty knowledge during the week of July 28, 1980, it is also fair to say that a much more substantial doubt would have appeared to exist if the period after the summer of 1980 had not been available for their consideration.

For these reasons, the charging of this case under a continuing offense theory requires reversal of the conviction and either dismissal of the indictment or a new trial.

III. THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE THE UNRESOLVED LITIGATION IN ROSTKER V. GOLDBERG PRECLUDED MENS REA FROM JULY 1980 THROUGH JUNE 1981 AS A MATTER OF LAW.

If the Court rules, as argued in Point II above, that nonregistration for the draft is not a continuing offense, the Court should not merely grant a new trial or order dismissal without prejudice, but rather should remand for dismissal of the indictment with prejudice. During the pertinent time period there was in effect a widely publicized ruling in a class action suit holding the registration program unconstitutuional. Accordingly, between July 28 and August 3, 1980, guilty knowledge of the duty to register was a legal impossibility.

During July 1980, there was legitimate confusion concerning whether the draft registration program was legally enforceable, in light of an injunction issued in the Eastern District of Pennsylvania and Justice Brennan's stay of that

order.[18] Rostker v. Goldberg, 448 U.S. 1306 (1980). The lower court's injunction was not reversed until the spring of 1981. Rostker v. Goldberg, 453 U.S. 57 (1981). During that interim, criminal intent could not exist as a matter of law.

In James v. United States, 366 U.S. 213 (1961), the Supreme Court considered the impact on a tax evasion case where the underlying substantive tax law had been in flux. The opinion announcing the judgment of the Court, subscribed by three Justices (Warren, Ch.J., Brennan & Stewart, JJ.), held that proof of criminal intent was impossible as a matter of law when, at the time the taxpayer deliberately failed to declare the proceeds of his embezzlement, the governing cases held that such gains were not "income." Thus, although in James the Court, by a 6-3 vote, overruled that precedent and declared embezzled funds to be taxable, the petitioner in that case was exonerated of evasion. Justices Harlan and Frankfurter concurred in part but contended that the accused taxpayer should have to put to the jury at a new trial whether his actual reliance on favorable (but later held to be erroneous) precedent created a reasonable doubt about his guilt. Id. at 241-47. Only Justice Clark thought the conviction should be affirmed. Id. at 241.[19] See also United States v. Critzer, 498 F.2d 1160

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[18] Indeed, a "spokesman for Selective Service" was quoted on the front page of the New York Times for July 19, 1980, as stating that "registration [would] go ahead on a voluntary basis until the full Court could hear the case." Dkt. 119, exh. 1.

[19] The remaining Members of the Court concurred in the reversal of the conviction on the basis that the underlying tax law principle should not have been changed, so that the petitioner had done no wrong by failing to report the embezzled funds. Id. at

(4th Cir. 1974) (Circuits interpret James to require dismissal).

Between July 1980 and June 25, 1981, the extant judgment in the Goldberg class action held that registration of men but not women for the draft violated the equal protection guarantee of the Fifth Amendment's due process clause. That judgment was stayed by Justice Brennan, but not reversed until the issuance of the full Court's opinion. A stay suspends temporarily the losing party's obligation to obey a court order, but it does not alter that order in the sense of changing the substantive state of the law. In the case of draft registration, this meant the government was free to proceed with the sign-up, but that any men who chose not to obey could not be compelled during that time. Thus, if nonregistration is not a continuing offense, then no one required under the Proclamation to register prior to the date of the Supreme Court's decision, such as the defendant-appellant in this case, can properly be convicted and punished.

IV. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY, AS REQUESTED BY THE DEFENDANT, THAT THE ACCUSED'S UNCORROBORATED STATEMENT IS NOT A SUFFICIENT BASIS FOR CONVICTION.

Critical to the prosecutor's case against Mr. Kerley were three letters he wrote to Selective Service which stated that he had not registered for the draft. As admissions, these statements were admissible against him for their truth. The defense was, however, that the statements in those letters might not be

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222-41 (Black & Douglas, JJ.); id. at 248-53 (Whittaker, J.).

true, but rather a form of political hyperbole or protest, designed to dramatize his opposition to the draft registration program. The prosecution also offered substantial evidence that Mr. Kerley was not registered, in the form of negative results of a search of the Selective Service registrant data base. This evidence, however, was subject to a sustained and potentially telling attack on its reliability.

At the charging conference and again at the close of the evidence, the defendant requested that the court instruct the jury on the corpus delicti rule, that is, that the uncorroborated statements of an accused are not sufficient proof of the commission of a crime to support a conviction. See Wong Sun v. United States, 371 U.S. 471, 488-93 (1963); Smith v. United States, 348 U.S. 147, 151-59 (1954) (and companion cases); United States v. Roth, 777 F.2d 1200, 1206-07 (7th Cir. 1985). The Magistrate and Judge refused this request, although the trial judge recognized its importance to the defense by suggesting instead that he would deliver an instruction on the theory of the defense. This was not an adequate substitute, however. Without the instruction, the jury could not know that it was unlawful to convict Mr. Kerley on the admission contained in his letters alone, if they were not persuaded by the computer evidence.

This Court has recognized the applicability of the corpus delicti rule concerning admissions in an analogous Selective Service case. In United States v. Rogers, 454 F.2d 601 (7th

Cir. 1971), the Court examined a conviction of a Jehovah's Witness for failure to report for alternate service as a Conscientious Objector. The panel found that his letters explaining why he could not report, corroborated by the official record in his file that he failed to appear, afforded sufficient evidence to convict. 454 F.2d at 604. No question of instructions, however, was at issue in that case.

In Borum v. United States, 409 F.2d 433 (D.C.Cir. 1967), cert. denied, 395 U.S. 916 (1969), the District of Columbia Circuit did discuss the need for instructions if a defendant is to have the benefit of a corroboration rule in a jury trial.

> While the matter of corroboration is initially for the trial court, like any other question as to the legal sufficiency of the evidence to warrant submission of the case to the jury, it is the latter's function to decide whether the standard of corroborative proof has been met. It goes without saying that the trial court must afford the jury proper and adequate guidance to enable that determination.

Id. at 438. See also United States v. Gardner, 516 F.2d 334, 345 (7th Cir. 1975) (approving jury instruction on voluntariness of extrajudicial statments that included a corpus delicti corroboration requirement).

On the facts of this case, the jury might have had difficulty reaching a unanimous decision on the reliability of the Selective Service computer evidence. Yet under the instructions they received, the jury may well have thought it could avoid deciding that controversy and rely solely on the defendant's letters to determine the element of failure to register.

Indeed, without the corpus delicti instruction the jury could even have thought that deciding the computer reliability issue in favor of the defendant still allowed a conviction, so long as they believed the statements in his letters. Either of these conclusions, although consistent with the court's instructions, would be erroneous and unlawful. Reversal of the conviction is accordingly required for failure to give the corpus delicti corroboration instruction as requested by the defense.

V. THE COURT ERRED BY INSTRUCTING THE JURY THAT IF THEY ENTERTAINED A REASONABLE DOUBT ABOUT THE DEFENDANT'S GUILT THEN THEY "SHOULD" ACQUIT HIM, WHEN THE LAW REQUIRES THAT IN THAT EVENT THEY MUST ACQUIT.

In the course of charging on reasonable doubt and the burden of proof, the trial court advised the jury as follows:

> Two essential elements are required to be proven .... If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Tr. 2B-43; App. 133.[20] This instruction, by stating that the jury "should" acquit if it harbored reasonable doubt rather than that it "must" then acquit, erroneously suggested that the jury enjoys some measure of discretion in deciding whether to acquit

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[20] The court also gave boilerplate instructions on the presumption of innocence and the requirement of proof beyond a reasonable doubt. Tr. 2B-40 to -41; App. 130-31. These did not explicitly state what the jury should do if, after considering all the evidence, it entertained a reasonable doubt.

when it has a reasonable doubt. This was plain error warranting reversal.

In United States v. Sheldon, 544 F.2d 213, 221-22 (5th Cir. 1976), the Court considered this precise question. In that case, in the course of explaining what the jury should do if it found differently with respect to the two codefendants, the trial court had said the jury "may find the one about whom you have a reasonable doubt not guilty and the other one guilty, or if you have no reasonable doubt about the guilt of both, you may find -- you should find both guilty." Id. at 221. The defendant argued that the court should have said "must," not "may." The panel unanimously agreed, "Of course, this contention is right. It is not correct that the jury may exercise any discretion as to whether to find a defendant not guilty if it has a reasonable doubt." Id. at 222.[21] Having held a new trial necessary for other reasons, the panel pretermitted the question whether this error was "plain," Fed.R.Crim.P. 52(b), since it "may well have been a slip of the tongue by the trial judge." Id. Cf. United States v. Gardner, 516 F.2d 334, 346 (7th Cir. 1975) (charge that jury "may" disregard confession if found involuntary, where defendant wanted "should," not plain error

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[21] The Bauer instructions on reasonable doubt and burden of proof do not address the question of the jury's duty. The Pattern Criminal Jury Instructions of the Federal Judicial Center (¼21, 1982), those of the Fifth (§§ 3A, 3B; 1983) and Eleventh Circuits (§§ 2.1, 2.2; 1985), and the Ninth Circuit 's Manual of Model Jury Instructions (§§ 3.02, 3.04; 1985), all use the term "must." See Devitt & Blackmar supplementary pamphlets.

where apparently a "slip of the tongue" in reading a standard instruction).

In the present case, we know that the erroneous "should" charge was not a "slip of the tongue." The erroneous language employed here was read directly from that drafted by the Magistrate at the pretrial conference. App. 123. The defendant's point for charge would have had the court instruct the jury, in accordance with Devitt & Blackmar, Federal Jury Practice and Instructions § 11.14 (3d ed. 1977), "So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit." App. 93-94. Thus, although he did not object after the charge was given, he did preserve his position on the record, although not adquately to avoid the obligation of showing "plain error." United States v. Jackson, 569 F.2d 1003, 1008-09 (7th Cir. 1978).

In Jackson, this Court found no plain error in a trial court's failure to give any explicit instruction in a self-defense case on who had the burden of proof, and by what standard, on the affirmative defense. In reaching this conclusion, the panel pointed to three factors: the defendant's theory was presented in the jury charge; defense counsel argued the burden of proof correctly in his closing; and evidence of guilt was overwhelming. The Court also pointed out that the trial court had charged "that if the jury accepted the defendant's version of the case it 'should find him not guilty.'"

569 F.2d at 1010.[22] Only the first of the three Jackson factors applies here. See Tr. 2B-42 to -43; App. 132-33 (theory of the defense charged). In his closing argument in this case, the defendant, acting pro se, actually reversed the burden of proof. Tr. 2B-32 ("If you find that that is all that you are convinced beyond a reasonable doubt that I have done, to merely make a protest, then you must find me not guilty.") Nor was the evidence of guilt so "overwhelming" as to preclude reasonable doubt, where it was based on the defendant's own politically-motivated statements and the reliability of the Postal Service's handling of registration cards and operation of the Selective Service computer system in its earliest months.

As this Court has repeatedly stated, in discussing instructions on the burden of proof, "The essential aspect of the matter it appears to us is that the jury clearly understand that there must be proof persuasive beyond a reasonable doubt." United States v. Lawson, 507 F.2d 433, 442 (7th Cir. 1974), cert. denied, 95 S.Ct. 1446 (1975),[23] quoted in United States v. DeJohn, 638 F.2d 1048, 1058 (7th Cir. 1981). In Gardner, supra,

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[22] It does not appear that a separate point was made in Jackson of the court's use of "should" rather than "must."

[23] The instruction approved in Lawson stated emphatically that if the government failed in its proof, "then you must acquit him. * * * * [Y]ou cannot find the defendant ... guilty unless you find beyond a reasonable doubt ...." 507 F.2d at 442 n.7. Accord, United States v. Richardson, 562 F.2d 476, 482 n.5 (7th Cir. 1977); United States v. Crouch, 528 F.2d 625, 630 (7th Cir. 1976); United States v. Shaffner, 524 F.2d 1021, 1023 n.2 (7th Cir. 1975).

a defendant complained of the use of the term "should" rather than "must" in the court's charge on burden of proof in connection with the defense of entrapment. This Court affirmed, pointing out that the general instructions on the burden stated "that if the Government failed to prove the defendant guilty beyond a reasonable doubt, they must acquit him." 516 F.2d at 349.

It is time for this Court to state explicitly, as the Fifth Circuit did in Sheldon, that it is error for a judge to instruct other than that a jury must acquit if it has a reasonable doubt about guilt. On this basis as well, a new trial is required.

VI. THE SENTENCE IMPOSED IN THIS CASE VIOLATED DUE PROCESS AND THE FIRST AMENDMENT.

The court imposed a sentence in this case on a nonviolent first offender who acted out of undisputedly sincere and unselfish motives of three years' imprisonment and a $10,000 fine. Its expressed rationale for this severe punishment lacked any factual basis and sought to achieve a cessation of activity protected by the First Amendment. Accordingly, the sentence must be vacated.

A. The Court Violated Due Process in Sentencing the Defendant to a Lengthy Term of Imprisonment Based in Part on the Unsupported Claim that He Was "Aiding, Abetting and Encouraging" Others to Refuse Draft Registration.

As set forth verbatim in the Statement of Facts above, the trial court imposed a three year prison sentence in this case on the basis that Mr. Kerley needed to be prevented, during a

lengthy period of parole supervision, from "aiding, abetting and encouraging" others to violate the draft law.[24] The judge made clear that he believed Mr. Kerley had done so in the past. There was no factual basis for this belief, and the sentence was accordingly unlawfully imposed, in violation of the due process clause.

A sentence may not be based on factual error or on a factual assumption without basis in the record. United States v. Hoffman, 806 F.2d 703, 713 (7th Cir. 1986); United States v. Andersson, 803 F.2d 903, 907 (7th Cir. 1986). Concomitantly, a sentence may not be premised, even in part, on a misapprehension of the legal significance of apparent facts. Roberts v. United States, 445 U.S. 552, 556 (1980); United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948). Here the judge's belief that the defendant had been (and was a risk

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[24] The lower court did not say that this factor explained the length of the prison sentence in terms of likely time to be served. Presumably he did recognize, however, as Mr. Kerley had made these statistics known to him prior to sentencing, that half of the other convicted nonregistrants since 1980 had been sentenced to probation, while the other half had received sentences requiring an average of about four months to be served, with the longest just over six months in prison. App. 138. Mr. Kerley's sentence, by contrast, requires confinement for twice the previous maximum, to wit, one full year. 18 U.S.C. § 4205(a). Compare Tr. (Sent.) 12 (erroneous statement of the court: "sentence of three years would mean perhaps one year or less"); App. 146. Moreover, it is the only prison term in such a case to have been coupled with a fine. It may also be noted that the U.S. Sentencing Commission's Guidelines (April 1987) for a case such as this (§2M4.1), now pending before Congress and scheduled to become effective Nov. 1, 1987, would call for either probation or not more than four month's confinement, and a $2500 fine.

to continue) aiding and abetting others' illegal nonregistration was either flatly erroneous[25] or else based on a mistaken notion of where the First Amendment line is drawn between lawful opposition to a statutory program and illegal incitement of criminal acts. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); Bond v. Floyd, 385 U.S. 116, 132 (1966) (rhetorical support for draft resistance protected by First Amend.); Collin v. Smith, 578 F.2d 1197, 1202-05 (7th Cir. 1978); cf. United States v. Falk, 479 F.2d 616, 619-20 (7th Cir. 1973) (en banc). There was no evidence that the defendant's conduct at any time had crossed or even approached that line.

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[25] It must be noted that the Mr. Kerley immediately denied the court's accusation. Tr. 15; App. 148-49. The court's emphasis on a letter in Mr. Kerley's support from a high school teacher in Kansas City is illuminating. That letter stated: "I have a number of students who are draft age or close and have had some deep, serious discussions about registering for the draft and how that fits into their beliefs. For some of those young men, the act of registering seems to be a violation of their moral beliefs and they are very torn about what to do. It is not an easy thing to act on your conscience when it involves breaking a law and when some people may interpret it as an act of juvenile rebellion or as an anti-patriotic act. ... Please consider giving Mr. Kerley a suspended sentence for this act reflecting sincere, non-violent political beliefs." App. 141-42. Compare Tr. 11, 13; App. 145 (court's reaction to and reliance on this letter).

The sentencing court also baselessly criticized a supporting letter from "an ordained elder in the United Methodist Church, with 50 years pastoral experience," which expressed the view that "we should encourage truly sincere and honest non-violent protesters against the corrupt life of the world" and praised Mr. Kerley's "pure witness to idealism, unlawful though it may be," urging "your kindest possible treatment," (App. 143-44). The court was troubled that this writer "perhaps for the moment doubts the command that 'Thou shalt obey.'" Tr. 11 (sic); App. 145.

While the First Amendment protects even abstract advocacy of illegal conduct, Brandenburg v. Ohio, supra, Mr. Kerley was not shown to have gone even that far. The sentencing court's apparent belief that only legislative activity can constitute a legitimate means of social and political change is both factually and legally incorrect. Indeed, legislative action is forbidden to the tax-exempt educational group Mr. Kerley worked for. 26 U.S.C. § 501(c)(3). The Committee Against Registration and the Draft is bound by law to employ public education exclusively as the means of achieving its goals, which -- although opposed to the policy of current statutory law -- are deemed educational and charitable, and thus in the public interest, even by the government itself. Cf. Regan v. Taxation With Representation, 461 U.S. 540 (1983) (tax exempt status available even for "dangerous" ideas); Bob Jones Univ. v. United States, 461 U.S. 574 (1983). No evidence in support of the judge's contentions was advanced by the United States, nor was there any in the Presentence Investigation Report. If the judge had some other source, he was bound to reveal it and give the defendant an opportunity to respond. United States v. Harris, 558 F.2d 366, 374 (7th Cir. 1977). In no event, however, can the sentence stand on this record.

B. The Court Violated the First Amendment in Sentencing the Defendant to a Maximum Fine on the Basis that He Had Been, in the Judge's View, "Underemployed" by Virtue of his Constitutionally-Protected Choice to Pursue Low-Paid Political Activity.

The record of the judge's remarks at sentencing, as amplified later in the bail hearing, makes painfully clear that

the maximum fine of $10,000 was imposed in this case for the purpose of forcing Mr. Kerley to change the nature of his employment. For some time prior to and through the trial, he was the part-time Midwest coordinator, and then the national Executive Director, of the Committee Against Registration and the Draft, at a salary of nor more than $500 per month. In addition, he was the owner of a small, politically-oriented bookstore in Madison, Wisconsin, which brought him an additional $750 in income. The lower court ordered, taking into account the subsequent amendments to the sentence, that Mr. Kerley pay $10,000 during the balance of his three year sentence after being paroled, which is to say over a two-year period.[26] Thus, he must pay over $400 per month, or 33% of his gross annual income of $15,000, toward the fine, leaving him $10,000 per year to live on.

The court made its understanding of this situation explicit when it described Mr. Kerley as "underemployed." Tr. (6/19/87),

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[26] Mr. Kerley's three year sentence was not imposed subject to 18 U.S.C. § 4205(b). Thus, he must serve a full third of the term before being eligible for parole. Id. § 4205(a). Because his U.S. Parole Commission Guidelines call for not more than four months' confinement before release, 28 C.F.R. § 2.20 & Offense Table ¶1031(c) (1986 ed.), he can expect to be paroled immediately upon reaching his eligibility date (having served three times what the Parole Commission considers appropriate), that is, to be confined one year and then to be on parole for two.

at 26; App. 152.[27] Since neither of his sources of income represents underemployment in terms of their demand for skills, the court could only have meant that Mr. Kerley was being obligated to make more money, that is, to change jobs. This fine constituted an abuse of the court's discretion under 18 U.S.C. § 3622(a), which sets forth the factors to be considered "in determining whether to impose a fine and the amount of a fine," in that it infringes on Mr. Kerley's First Amendment right to work for the political ideals in which he believes.

As discussed in Part A of this Point above, a sentence that relies upon an improper factor is subject to appellate reversal. Section 3622(a)(3) of the 1984 Fine Enforcement Act requires that the court consider, among other factors in deciding on a fine, the "income, earning capacity, and financial resources" of the defendant. Like any statutory provision, however, it must be construed and applied within the confines of the Bill of Rights. In this case, the fact that his income has been lower than it would be if economic self-interest were his highest priority does not represent either a lack of motivation or a desire to avoid financial obligations. Instead, the record is quite clear that his income level is the consequence of his unselfish determination to work for certain unpopular political principles.

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[27] As noted in the Statement of Facts, this statement seems to modify the somewhat different reasons articulated by the judge at the time of imposition of the sentence. App. 148.

This choice is Mr. Kerley's right under the First Amendment, and not one which is limited by the fact of a criminal conviction. United States v. Lemon, 723 F.2d 922, 937-38 (D.C.Cir. 1983) (collecting and discussing cases). It cannot be contended, for example, that either his own rehabilitation or the community's protection requires him to earn more money at the personal cost of accepting an apolitical (or politically distasteful) job. For these reasons, the statutory maximum fine imposed in this case infringed the defendant's rights under the First Amendment, and must be vacated and remanded.

CONCLUSION

For the reasons set forth under Point III above, this Court should reverse the appellant's conviction and remand for dismissal of the indictment with prejudice. Barring that relief, for the reasons set forth under Point II, the case should be remanded for dismissal without prejudice. For any of the reasons explained under Points I, IV, and V, a new trial must be awarded. At the very least, the appellant's sentence should be vacated and a resentencing scheduled.

Respectfully submitted,

Dated: August 4, 1987

By: PETER GOLDBERGER, ESQUIRE
The Ben Franklin, suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107

(215) 923-1300

Attorney for the Appellant

CERTIFICATE OF SERVICE

On August 4, 1987, I served two copies of the foregoing Brief and a copy of the Appendix on the attorney for the appellee, the United States, first class mail, postage prepaid, addressed as follows:

John R. Byrnes, Esq.
United States Attorney
120 No. Henry St.
Madison, WI 53703

Counsel for the appellant wishes to thank Suzanne de Seife, a student at Villanova Law School, for her assistance in the preparation of this brief.

APPENDIX UNDER CIRCUIT RULE 30(a)

Pursuant to Circuit Rule 30(c), counsel for the appellant states that the following Appendix includes all of the materials required by part (a) of Circuit Rule 30, to wit:

1. Order of Judgment and Commitment

2. Orders Amending Sentencing

3. Excerpt from Sentencing Transcript (statement of reasons for judgment imposed)

4. Excerpts from Bail Hearing Transcript (amplifying reasons for sentence and amending sentence)

DEFENDANT: GILLAM TERLEY
Post Office Box 246, Madison, Wisconsin 53703

the Western District of Wisconsin

DOCKET NO. 82-CR-47

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (Rev. 8/82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
May	29	1987

[X] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[ ] WITH COUNSEL _____
(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Failure to Register for Military Selective Service Act. 50 U.S.C. Appendix §§ 453 and 462(a).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years as to Count I. It is further adjudged that the defendant receive a committed fine in the sum of $10,000.

SPECIAL CONDITIONS OF PROBATION

The Court finds that this defendant is not a flight risk or a danger to the community. It is ordered that the defendant voluntarily surrender himself to an institution to be designated by further Court order between the hours of 10:00 A.M. and 11:00 A.M. on June 22, 1987. The Bureau of Prisons' officials are designated as officers of the Court for the defendant's required appearance to commence his sentence on June 29, 1987. It is further ordered that the defendant's present bail conditions continue until June 22, 1987, when he is to report to the designated institution.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer

5-29-87

SIGNED BY
[ ] U.S. District Judge
[ ] U.S. Magistrate

John C. Shabaz

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILLAM KERLEY,

Defendant.

ORDER

82-CR-47-S

Defendant's motion for stay of execution of sentence of imprisonment pending appeal in the above entitled matter came on to be heard before the Court on June 19, 1987, the plaintiff having apeared by John R. Byrnes, United States Attorney, by Grant C. Johnson; the defendant in person and by his attorneys, Cullen, Weston, Pines & Bach, by Lester A. Pines and Ruth Robarts. The Hon. John C. Shabaz, District Judge, presided.

For those reasons enunciated from the bench the Court has determined that the defendant is not a flight risk, but that he has failed to present to the Court substantial questions of law or fact likely to result in reversal or an order for new trial.

Accordingly,

ORDER

IT IS ORDERED that the defendant's motion for stay of execution of sentence of imprisonment pending appeal is DENIED.

IT IS FURTHER ORDERED that the defendant's request for a limited stay to appeal this order is GRANTED.

Copy of this document has been mailed to the following: Attys. Johnson and Pines; and Probation

this 19 day of June, 1987

IT IS FURTHER ORDERED that the defendant Gillam Kerley, having previously been sentenced in the above case to the custody of the Attorney General, is hereby ordered to surrender himself to the Attorney General by reporting to the United States Penitentiary, Leavenworth Satellite Camp, Leavenworth, Kansas, 66048, on July 10, 1987, between the hours of 10:00 A.M. and 11:00 A.M., or to that other institution which may be designated.

IT IS FURTHER ORDERED that the Attorney General or his authorized representative are designated as officers of the Court for purposes of receiving the defendant to begin his commencement of sentence, and that the defendant's present conditions of release shall continue until July 10, 1987, when he is to report to the designated institution.

IT IS FURTHER ORDERED that the committed fine in the sum of $10,000 is to be paid within three years from the imposition of sentence on May 29, 1987, upon those reasonable terms and conditions as may be determined by the Offices of either Parole or Probation, where unable to be determined by the parties. Reasonable payments are to commence upon the defendant's release from confinement at the rate of not less than $200 per month, the defendant to provide security therefor, as suggested by the defendant, with his book inventory.

Entered this 19th day of June, 1987.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILLAM KERLEY,

Defendant.

ORDER

82-CR-47-S

Plaintiff's motion for amendment of judgment came on to be heard in the above entitled matter on July 1, 1987, the plaintiff having appeared by John R. Byrnes, United States Attorney, by Grant C. Johnson; the defendant by Cullen, Weston, Pines & Bach, by Lester A. Pines. The Hon. John C. Shabaz, District Judge, presided.

ORDER

IT IS ORDERED that the order entered by this Court on June 19, 1987, is AMENDED as follows:

The defendant is to provide security to the government in his book inventory forthwith, and shall either personally or by duly authorized agent advise the U.S. Attorney's office on a monthly basis the value of those secured assets, commencing August 1, 1987.

Copy of this document has been mailed to the following: Attys. Johnson and Pines this 1 day of July, 1987

By Ellie Blaschko
Secretary to Judge John C. Shabaz

IT IS FURTHER ORDERED that the government may follow usual recovery procedures when it has cause to believe that its security is being inappropriately diminished.

IT IS FURTHER ORDERED that in all other respects the motion to amend is DENIED.

Entered this 1st day of July, 1987.

BY THE COURT:

JOHN C. SHABAZ
District Judge

incarceration be imposed.

THE COURT: The Court has specifically examined the letters which were received today and believes that the sentence must be crafted to adjust itself to not only specific deterrence but general deterrence as well.

From the examination of the position of the Defendant and those letters of support, there appears to be the support for his position for many of the reasons which do not square with the belief that this is a government of laws rather than a government of men and women.

The Court is particularly troubled by the example which is used by the school teacher in Kansas City, Missouri who perhaps by her silence, by her support of the defendant, encourages high school students to also violate those laws which they believe are opposed to their moral beliefs. The Methodist minister from Oregon who perhaps for the moment doubts the command that "Thou shalt obey." The other folks, the friends, Quakers, those folks involved in the religious movement who appear to be missing the point here, that we all understand to exist, that registration would not have placed the Defendant in the military where it may be violative of his conscientious objection or his religion.

The Court must liken this to perhaps the well-intentioned tax protestor who fails to file or who evades, the person who perhaps trafficks in drugs, because that person

believes that the Government should not provide laws which restrict that activity.

And, in attempting to craft a sentence, the Court has analyzed the options which it has available. The thread of the Presentence Report would suggest that a period of six months incarceration is the median. And, Mr. Kerley appears to understand that from this Court's examination of the contents of the Presentence Report.

The Court must perhaps express its concern with the present laws related to sentencing which through legislative action and not unlawful protest has been changed effective November 1 of this year. Because, as Mr. Kerley is aware, a sentence of one year would perhaps mean nine to ten months of incarceration; sentence of three years would mean perhaps one year or less; the difference between the two being reasonable insignificant. But, in this instance, the Court is of the opinion that the higher period of sentence is appropriate because the Court believes that there is the encouragement of the Defendant to others to violate, as perhaps is indicative of his position as the executive director of the Resistance Movement at I believe $500.00 per month. And, it would appear that from the comments of the Defendant and those portions of the Presentence Report that it is his continued desire to actively and perhaps illegally oppose those laws without resorting to appropriate

legislative action, which he could so very well do based upon his tremendous abilities.

And so, in order to deter the Defendant from his continued illegal activity and his aiding and abetting those others who may follow in his footsteps, particularly those high school students in Kansas City and throughout the nation, the Court has determined that the higher sentence is the appropriate sentence, not because of the relatively insignificant difference that there may be in incarceration, but because of the fact that once that incarceration has been completed, there will be a lengthy period of parole, and pursuant to that parole, there will be the supervision which has been referred to in the Presentence Report in this matter at page eight, that should Gillam Kerley be placed on supervision, it is recommended that as a condition the Defendant not be allowed to actively work against the system. That, of course, cannot be pursued because of the fact that the Defendant is certainly available to work against the system in a legal manner.

But, the Court believes that the supervision which will be provided will thwart his illegal activities directed at the system, and will thwart his attempts and his ability to aid, abet and encourage others during that period of parole to violate the laws. That then is the reason for the more significant period of imprisonment which will be

ordered by this Court.

The Court has also determined that it is appropriate for the maximum fine to be levied in this matter. The Court, from the examination of the Presentence Report, is of the opinion that there is in this instance the appropriate support of his family, and the Court is of the opinion that the family's financial resources does indeed provide him the luxury to choose to be under-employed based on the ready ability of the family to provide that support and financial assistance. And, the Court believes that the fine is more appropriately to be provided for the incalculable expenses pursued by the Government's pursuit of this conviction.

The Court will then at this time enter that sentence which it believes to be appropriate based upon its articulation of the reasons for that sentence. It is adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of three years. It is further adjudged that the Defendant receive a committed fine in the sum of $10,000.00. Is there anything further to come before the Court at this time, Mr. Byrnes?

MR. BYRNES: Not for the Government.

THE COURT: Mr. Kerley?

MR. KERLEY: Several items, Your Honor. One, in response to the Court's comments, I am not aware of any

Amendment or 462(a) by the failure of the Court to schedule this case for trial in a more timely fashion.

The Court has not addressed itself to the second prong of this test as to whether or not a different result would require a new trial or a decision favorable to the defendant because neither of those issues in (a) or (b) are considered by this Court to be substantial or close.

The Court can address both prongs in the second item which has to do with sentencing. Certainly even if the sentencing were as has been suggested by the defendant to be an abuse of this Court's discretion, it would not result in a new trial but a return to this Court for more appropriate sentencing. However, this Court's examination of the motion, together with the provisions which are set forth in the presentence report, leads this Court to conclude that the sentencing in this matter was indeed correct. The defendant's conduct, coupled with that testimony which the Court heard from Marion Nadell (ph.), convinces this Court and did convince the Court at that time that a 3-year sentence was necessary, particularly for the parole supervision which would have been adjunct to that sentence so that the defendant would not be able to even attempt to actively violate the Selective Service laws and to actively encourage others to do so.

The Court believes that the sentence was necessary as a need to protect the public from these continued offenses, and

the Court believes that should be one of its paramount concerns in crafting a sentence which relates to illegal activities.

The Court then addresses itself to the fine. The Court does not find the fine to be excessive. The Court, from its examination of the presentence report, is able to determine at the time of sentencing that the income of the defendant from the two principal sources of livelihood totalled $1,250 per month. There was the book store operation, together with his position as executive director of the Committee Against Registration and the Draft.

The Court noted at the sentencing that the parents have indeed been supportive with funds in the past. The Court perhaps did not as clearly enunciate the following, which should perhaps have been brought to the defendant's attention. The defendant up to now has had the luxury to choose to be underemployed and to restrict and withhold his income potential as the result of the support that he has received and the continuing support from his family. The Court believes that his income potential is such that the $10,000 fine is indeed minimal when examining the qualifications, the experience, and the tremendous abilities of this defendant.

The Court will, however, address itself to the payment of that fine at the conclusion of this opinion, having determined from the argument of Mr. Pines that there should be a way of providing for its payment in a less than painful manner

and the procedure which was followed, is of the opinion that the promulgation of those regulations have not in any way denied or violated the defendant's due process rights. The Court is of the opinion that there are no substantial issues, there are no difficult questions, there are no close questions, and believes that it is appropriate to deny the motion of the defendant for a stay pending appeal and does indeed enter that order.

The Court, however, has crafted an amendment which it believes to be appropriate in light of the committed fine which has been argued by Mr. Pines. It is ordered that the fine of $10,000 is to be paid within the 3-year period upon those reasonable terms and conditions as may be determined by either the Parole Officer or the parties themselves to be reasonable. Payments are to commence upon the defendant's release from confinement at the rate of no less than $200 per month. The defendant provides security therefor in the form of a lien on his book inventory as suggested by the defendant's counsel. Is there anything further to come before the Court at this time, Mr. Pines?

MR. PINES: I have nothing, your Honor, other than to ask the Court to enter a stay of the execution of sentence in order to allow the defendant to appeal today's order to the United States Court of Appeals for the Seventh Circuit.

THE COURT: Mr. Johnson?

MR. JOHNSON: I strongly object to that, your Honor.