No. 12-853

IN THE

Supreme Court of the United States

T.W.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICI CURIAE* OF FORMER OFFICIALS WITH THE DEPARTMENT OF JUSTICE, TAX DIVISION, AND INTERNAL REVENUE SERVICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The *amici* filing this brief are former U.S. government officials, including former senior trial attorneys with the Internal Revenue Service ("IRS") and with the Tax Division of the U.S. Department of Justice ("DOJ"). Appendix A, attached hereto as 1a-5a, contains a list of the *amici*, along with biographical information for each.[1] During their careers, these individuals -- some of whom held very senior policy positions -- were charged with enforcing U.S. tax laws through criminal, civil, and appellate litigation. They conducted major criminal tax investigations and prosecuted individuals who used various means to evade U.S. tax laws, including offshore banking. As such, the *amici* applied the Bank Secrecy or Currency and Foreign Transactions Reporting Act of 1970 ("the Bank Secrecy Act" or "the Act"), Pub. L. No. 91–508, 84 Stat. 1114 (codified as amended and revised at 31 U.S.C. §§ 5311–5326 (2001)) and the regulations promulgated under it. Consequently, the *amici* are uniquely positioned to opine on the manner in which the DOJ's Tax Division construed its grand jury subpoena powers under the Act.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae's* intent to file and have consented to this filing in letters on file with the Clerk's office.

The *amici* urge this Court to accept T.W.'s Petition for review because the overbroad subpoena powers approved by the Seventh Circuit in *T.W. v. United States*, 691 F.3d 903 (7th Cir. 2012), do not comport with the previous investigative practices at the DOJ's Tax Division and, moreover, violate the protection against self-incrimination afforded to U.S. taxpayers by the Fifth Amendment. The Seventh Circuit's ruling not only affects taxpayers, but undermines public confidence in the fairness of our system of justice. Finally, the Seventh Circuit's rationale is unbounded; it is not limited to records of offshore banking, but could apply to any private activity for which Congress does -- or could -- require record-keeping.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is an overly aggressive application of the so-called required records doctrine to compel any taxpayer to produce information and documents regarding his or her *personal* offshore banking to the government when it is conducting a criminal tax investigation of that taxpayer. This Court first articulated the required records doctrine in *Shapiro v. United States*, 335 U.S. 1 (1948), holding that the constitutional privilege against self-incrimination did not protect individuals against compelled production of records that the law required them to keep. By applying this 65-year-old doctrine -- which was formulated in another day and age -- to the records of private banking activities at

offshore banks, the Seventh Circuit effectively eviscerated the Fifth Amendment protections in the context of criminal tax investigations. Specifically, the Seventh Circuit held that the government can require individuals to keep personal banking records that might incriminate them, and then subpoena and use those same records in criminal tax prosecutions against the individuals without affording them their Fifth Amendment act-of-production protections.

Such an expansion of the U.S. government's prosecutorial powers comes as a surprise to the *amici* who, for years, successfully investigated and prosecuted criminal tax evasion and fraud without infringing the taxpayers' constitutional rights. In fact, there are at least 23 signed and filed plea agreements and several successful convictions after trial in offshore banking cases since the IRS/DOJ launched their current enforcement initiative.[2] A sample plea agreement is attached hereto as Appendix B at 6a-14a (the remaining 22 plea agreements are on file with the *amici's* counsel). *See also* guilty verdicts in *United States v. Berrettini*, No. 4:07-cr-0422, 2010 WL 1724144 (M.D. Pa. Mar. 5, 2010); *United States v. Assor*, No. 10-60159-cr-ZLOCH, 2010 WL 5683646 (S.D. Fla. Oct. 7, 2010); *United States v. Simon*, No. 3:10-cr-56(01)RM, 2011 WL 1304438 (N.D. Ind. Apr. 5, 2011). To the *amici*'s

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[2] This Court can take judicial notice of these written plea agreements, which are part of the public court files in their respective cases. Fed. R. Evid. 201; *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012).

knowledge, the Government successfully prosecuted the vast majority of cases without resort to the subpoena of the type at issue here.

While the elimination of taxpayers' constitutional protections certainly makes prosecutors' jobs easier, it changes the nature of our criminal justice system -- from an adversarial, accusatorial system, where the government has to do the groundwork to investigate and prove a crime, to a system reminiscent of the Star Chamber, where evidence was obtained by forcing subjects of criminal investigations to testify against themselves.

The current trend of eliminating the Fifth Amendment protections in the context of criminal tax investigations is particularly alarming because it creates a slippery slope: the recent holdings in this case, *T.W. v. United States*, 691 F.3d 903 (7th Cir. 2012); as well as in *In re M.H.*, 648 F.3d 1067 (9th Cir. 2011); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); and *In re Grand Jury Proceedings, No. 4–10*, No. 12-13131, 2013 WL 452768 (11th Cir. Feb. 7, 2013); offer no principled basis on which to distinguish between compelled production of *offshore* personal banking records and records of *domestic* personal banking activities, or, for that matter, the records of any type of personal activities in which the government shows sufficient interest.

REASONS FOR GRANTING T.W.'S WRIT

This Court should grant the Petition filed by T.W. and review the Seventh Circuit's decision in *T.W. v. United States*, 691 F.3d 903 (7th Cir. 2012), to provide much needed guidance to federal courts and to ensure that, in upcoming prosecutions, courts do not misapply the required records doctrine to encroach upon the U.S. taxpayers' Fifth Amendment right against self-incrimination. In particular, the *amici* urge this Court to grant T.W.'s Petition because the Seventh Circuit's holding: (1) goes against the DOJ's prior practices in investigating criminal tax cases, directly contravening taxpayers' Fifth Amendment rights, and (2) creates a slippery slope that threatens to eliminate the Fifth Amendment protections not only in the context of investigating offshore tax fraud, but also in the context of domestic personal banking activities and any other personal activities in which the federal government shows sufficient interest to require record-keeping.

I. This Court Should Grant Review Because The Seventh Circuit's Holding Approves A Drastic Departure From The DOJ's Prior Practices.

This Court should grant T.W.'s Petition because the overbroad grand jury subpoena powers authorized by the Seventh Circuit constitute a drastic departure from the DOJ's prior practices. When the *amici* were charged with enforcing federal tax laws, they exercised their prosecutorial powers

within the constraints of the U.S. Constitution, with due regard to the taxpayers' constitutionally-guaranteed rights. Key among these rights is the Fifth Amendment's direction that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

The policy rationale behind the Fifth Amendment reflects many of our society's most fundamental values, including "respect for the inviolability of the human personality." *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964). In particular, courts have repeatedly expressed unwillingness to subject those suspected of a crime "to the cruel trilemma of self-accusation, perjury or contempt." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990); *Doe v. United States*, 487 U.S. 201, 212 (1988). Additionally, the Fifth Amendment reflects our society's sense of fair play, which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 WIGMORE, EVIDENCE 317 (McNaughton rev., 1961). In other words, it is the government's duty to do the groundwork in collecting incriminating evidence against the accused, rather than short-cutting its obligations by obtaining incriminating information from a target of a criminal investigation.

This Court has applied the Fifth Amendment's guarantee against self-incrimination not only to oral

statements, but also to the act of producing documents in response to a grand jury subpoena, if such an act is testimonial and "communicates information that 'may lead to incriminating evidence.'" *United States v. Hubbell*, 530 U.S. 27, 38 (2000). For instance, in *Hubbell*, this Court affirmed the dismissal of tax evasion charges where the prosecutors learned about a defendant's unreported income from the contents of the documents that the defendant himself had previously produced to the government in exchange for a grant of immunity. This Court explained that "the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence." *Id.* at 43.

Here too, producing documents in response to a grand jury subpoena like the one the government issued in this case would constitute, at a minimum, an acknowledgement that the witness is subject to the Bank Secrecy Act regulations; that he or she has ownership or control over the given foreign bank accounts; that he or she controls any foundation, trust, corporation or entity holding the account; and that the banking records he or she is producing are authentic -- all of which are factual statements akin to compelled testimony and elements that the government has to prove in a criminal case against a taxpayer. If the government were to call the taxpayer before the grand jury and ask these questions directly to him/her, there would be no

question the taxpayer could assert his/her Fifth Amendment privilege to refuse to answer. So too should the taxpayer be able to assert his/her Fifth Amendment privilege to refuse to provide act-of-production testimony. Additionally, because this information is likely to lead to the discovery of additional incriminating evidence, it constitutes "a link in the chain of evidence needed to prosecute" the target of the subpoena. *Hubbell*, 530 U.S. at 38.

Accordingly, in the past, when investigating alleged tax crimes, the DOJ's Tax Division rarely built its cases by issuing grand jury subpoenas calling for production of personal financial information to the targets of its criminal investigations. This explains why, even though the Bank Secrecy Act has been on the books for more than 40 years, until recently there *have been no reported cases* addressing whether the government could compel targets of criminal investigations to produce their personal banking records. Rather, litigation has focused on whether the government may subpoena an individual's financial records from *third parties*, such as banks and brokerage firms. *See, e.g.*, *United States v. Miller*, 425 U.S. 435, 442-443 (1976); *Nat'l Commodity & Barter Ass'n v. United States*, 951 F.2d 1172 (10th Cir. 1991); *First Nat'l Bank of Tulsa v. U.S. Dep't of Justice*, 865 F.2d 217 (10th Cir. 1989); *In re Grand Jury Proceeding*, 842 F.2d 1229 (11th Cir. 1988); *In re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306 (5th Cir. 1977). There was also litigation addressing whether the IRS may serve its *administrative*

summonses on third parties, such as attorneys. *See*, *e.g.*, *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991); *United States v. Leventhal*, 961 F.2d 936 (11th Cir. 1992); *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994); *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995). Absent from these cases is any discussion of the government issuing grand jury subpoenas for personal banking records to the very targets of its criminal tax investigations. This is so because, as these *amici* know, the government never believed that it possessed such far-reaching power to abrogate an individual's Fifth Amendment rights. Hence, the recent trend marks a drastic departure from the DOJ's prior practice and the Seventh Circuit's decision marks an aggressive -- and unconstitutional -- new interpretation of the 65-year-old required records doctrine.

While compelling witnesses to produce self-incriminating evidence is certainly the easiest way to build a case against them, it is by no means the only technique available to the U.S. government. There are other investigative tools available to law enforcement to uncover the same information, which do not violate the individuals' constitutional rights. Such investigative tools include international discovery process treaties and information sharing agreements with foreign countries. *See, e.g.,* Criminal Tax Manual, "Obtaining Foreign Evidence," Ch. 41.00, (2008 ed.), available at http://www.justice.gov/tax/readingroom/2008ctm/CTM%20TOC.htm; *see also United States v. Sturman*,

951 F.2d 1466, 1482-83 (6th Cir. 1991) (obtaining information by means of the 1973 Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters).

If there are no such treaties in place with a given country, the IRS and DOJ may request records from domestic credit card companies to monitor an individual's use of debit or credit cards drawn on a foreign bank account. This investigative technique allows the government to identify potential tax evaders by gathering documents related to them when the credit card companies clear their financial transactions as part of the repatriation scheme. *See* Thomas Zehnle and George Clarke, *When the Wall Comes Crumbling Down: What to Do With Taxpayers Who Cannot or Will Not Voluntarily Disclose*, BNA White Collar Crime Report (Jan. 13, 2012), 2012 WL 77683.

Additionally, since 2003, the IRS has rolled out its Offshore Voluntary Compliance Initiative to encourage taxpayers to disclose voluntarily their secret accounts and agree to clean up their tax liabilities. *Id.* at 2. Qualifying taxpayers received promises regarding the penalties that they would incur and assurances that they would not be prosecuted criminally. *Id.* This Initiative has succeeded: the IRS reports that, since 2009, up to 38,000 have made voluntary disclosures and it has collected more than $5.5 billion in back taxes, interest, and penalties from taxpayers through this program. *Protection of Taxpayer Rights in Compliance*

Initiatives, Taxpayer Advocate Service, 2012 Annual Report to Congress, Vol. I, p. 144, available at www.taxpayeradvocate.irs.gov.

Finally, the IRS has instituted a whistleblower program that has proved successful. *See* David Kocieniewski, *Whistle-Blower Awarded $104 Million By IRS*, N.Y. TIMES, Sept. 11, 2012; *Practitioners Warned About Sanctions for Offshore Accounts*, 65 Tax Prac. 221 (Mar. 22, 2010).

Hence, the government possesses many investigative tools to fight tax evasion and fraud without infringing taxpayers' constitutional rights. If the Seventh Circuit's decision is allowed to stand, it would encourage the government to coerce subjects of its criminal investigations into producing their own personal offshore banking records. Without doubt, it would be easier to short-circuit the normal investigative process by enacting laws requiring individuals to create and amass evidence of their activities, which the government may then tap whenever it has a mere suspicion of wrongdoing. Such a practice, however, would not comport with the constitutional guarantees and would fundamentally alter the DOJ's investigative function. This Court should accept T.W.'s Petition in this case to ensure that the lower courts' application of the required records doctrine does not expand the government's prosecutorial powers impermissibly, in violation of the U.S. Constitution.

II. This Court Should Grant T.W.'s Petition Because The Seventh Circuit's Decision Threatens To Eliminate Fifth Amendment Protections In A Wide Variety Of Criminal Investigations.

This Court also should grant T.W.'s Petition because, if the Seventh Circuit's decision is allowed to stand, it would create a slippery slope with a potential to eliminate Fifth Amendment protections in a broad range of criminal investigations not limited to offshore banking.

Specifically, the Seventh Circuit held that an individual's "voluntary choice to engage in an activity that imposes record-keeping requirements under a valid civil regulatory scheme carries consequences, perhaps the most significant of which, is the possibility that those records might have to be turned over upon demand, notwithstanding any Fifth Amendment privilege." *T.W.*, 691 F.3d at 909. This holding is not limited to offshore banking activities; rather, it could apply to all voluntarily undertaken activities on which the government chooses to impose record-keeping obligations.

For instance, individuals voluntarily purchase alcoholic beverages and cigarettes, and both alcohol and tobacco are subjects of government's valid civil regulatory scheme. Likewise, an individual may choose voluntarily to purchase certain merchandise

online, rather than in brick-and-mortar stores, and the government regulates online vending. Under the Seventh Circuit's ruling, if the government chooses to require by statute all individuals to keep a record of their alcoholic and tobacco purchases and consumption, or a record of all their online purchases, then, at the government's request, individuals would have to turn over these records of purely private activities to the government or face the prospect of contempt sanctions or criminal prosecution for refusal. As one treatise explained, "Stated in the most extreme form, the [required records] doctrine would appear to permit the government to render any documents it chooses exempt from the privilege against self-incrimination simply by requiring that those documents be maintained." GRAND JURY LAW & PRACTICE § 6:13, *4 (2d ed. 2012).

Because of this potentially sweeping scope of the required records doctrine, courts previously have limited its application to the records that were analogous to public records, and have declined to compel subjects of criminal investigations to produce ostensibly personal documents, such as personal banking records. For instance, in *United States v. Lehman*, 887 F.2d 1328 (7th Cir. 1989), the Seventh Circuit reversed, as overbroad, a district court order requiring production of all personal bank records of the accused even though the government claimed that these records reflected illegal transactions subject to administrative regulations. The Seventh Circuit explained that such a broad subpoena

"needlessly defeats reasonable expectations and undermines the legitimacy of the administrative investigatory system." *Id.* at 1335. Likewise, commentators stated that "the government may not rely on the required records doctrine to obtain *ordinary personal or business records* having no special 'public aspect.'" GRAND JURY LAW & PRACTICE § 6:13, *8 (2d ed. 2012) (emphasis added).

The Seventh Circuit's holding in *T.W. v. United States*, however, provides no principled basis or reason for distinguishing between the records that have acquired a "public aspect" and purely personal records in which the government has shown interest. Hence, developed to its logical conclusion, the Seventh Circuit's decision will eviscerate the Fifth Amendment protection against self-incrimination in a wide range of criminal investigations, not limited to offshore banking. Indeed, the *T.W.* holding would eviscerate this Fifth Amendment protection whenever the government would require individuals to keep record-keeping of their activities. As the Seventh Circuit stated in *Smith v. Richert*, 35 F.3d 300, 303 (7th Cir. 1994), expansive application of the required records doctrine would produce the world in which everybody lives in a glass house, with individuals required to maintain a record of everything they do that interests the government.

For that reason, an authoritative treatise on evidence characterized the required records doctrine as being "of questionable wisdom." "This is essentially a conclusion that the need for disclosure

outweighs relatively minimal intrusion upon protected interests caused by compelled production. … Now that the federal constitutional privilege applies only to the act of production, however, the quite limited protection afforded self-incrimination interests may not justify limitation by balancing of interests." 1 MCCORMICK ON EVIDENCE §139 (6th ed. 2009).

Surely, the government should not be able to take away the protections guaranteed by the U.S. Constitution merely by passing a record-keeping statute. Eviscerating a person's constitutional privileges should not be that easy. Finally, as the *amici* participating in this brief can attest, successful prosecution of tax and other offenses simply does not require or justify the Seventh Circuit's expansive application of the required records doctrine to the detriment of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, *amici* urge this Court grant T.W.'s Petition for Writ of Certiorari in this case and reverse the decision of the Seventh Circuit.

Dated: March 7, 2013

Respectfully submitted,

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Appendix A

The *amici curiae*[1] are as follows:

Frank Agostino was an attorney with the IRS Office of District Counsel in Newark, New Jersey and in Springfield, Illinois, from 1986 to 1988. He also served as a Special Assistant United States Attorney concentrating in criminal tax prosecution. He is currently a principal at Agostino & Associates, P.C.

Dennis N. Brager served as a Senior Trial Attorney in the IRS Office Of Chief Counsel from 1978 to 1984. He is currently a principal of Brager Tax Law Group.

James A. Bruton, III served as Deputy Assistant Attorney General, Tax Division from 1989 to 1992 and Acting Assistant Attorney General, Tax Division from 1992 to 1993. He is currently a partner at Williams & Connolly LLP.

Michael C. Durney was formerly Deputy Assistant Attorney General and Acting Assistant Attorney General for the Tax Division of the U.S. Department of Justice from 1986 to 1988. He also served as a Trial Attorney with the Tax Division of the U.S. Department of Justice from 1968 to 1972.

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[1] All of the *amici* are signing this brief in their capacity as former government officials, and not on behalf of their current firms/employers.

He currently has a private legal practice in Washington, D.C.

Steven Gremminger served as a Senior Trial Attorney and Reviewer in the Tax Division of the U.S. Department of Justice from 1980 to 1993. He is currently the principal and owner of the Gremminger Law firm.

Nathan Hochman served as Assistant Attorney General in the Tax Division of the U.S. Department of Justice from 2008 to 2009. He also served as an Assistant United States Attorney for the Criminal Division of the U.S. Department of Justice for the Central District of California from 1990 to 1997. He is currently a partner with Bingham McCutchen LLP.

Lawrence S. Horn served as an Assistant U.S. Attorney for the District of New Jersey prosecuting tax fraud at the U.S. Department of Justice from 1971 to 1978. He is currently a member of Sills, Cummis & Gross P.C.

Paula M. Junghans served as a Deputy Assistant Attorney General and Acting Assistant Attorney General in the Tax Division of the U.S. Department of Justice from 1998 to 2001. She is currently a partner with Zuckerman Spaeder LLP.

Barbara T. Kaplan served as a Trial Attorney in the IRS Office of Regional Counsel from 1975 to 1978 and as a Senior Trial Attorney at the IRS Office of

District Counsel in New York, N.Y. from 1978 to 1979. She is currently a shareholder of Greenberg Traurig, LLP.

Emily J. Kingston served as Trial Attorney in the Tax Division of the U.S. Department of Justice from 1989 to 1992, and as Special Assistant U.S. Attorney in the IRS Office of Chief Counsel from 1992 to 1995. She also served as Assistant U.S. Attorney and Trial Attorney in the Civil and Tax Divisions of the U.S. Attorney's Office for the Northern District of California from 1995 to 2005. She is currently a partner with Sideman & Bancroft LLP.

John A. Marrella served as Deputy Assistant Attorney General in the Tax Division of the U.S. Department of Justice from 2007 to 2009. He also served as a Trial Attorney in the Tax Division from 1991 to 1998, and an Assistant United States Attorney for the District of Connecticut from 1998 to 2007. He currently serves as General Counsel for Knights of Columbus in New Haven, Connecticut.

Roger M. Olsen served as an Assistant Attorney General in the Tax Division of the U.S. Department of Justice from 1985 to 1987, and as a Deputy Assistant Attorney General from 1983 to 1985. He also served as a Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice from 1981 to 1983. He currently maintains a private legal practice in Washington, D.C.

Edward M. Robbins, Jr. served as Chief of the Tax Division of the United States Attorney's Office for the Central District of California from 1994 to 2004. He was also a Trial Attorney with the IRS Office of Chief Counsel from 1978 to 1983, and an Assistant U.S. Attorney with the Tax Division from 1983 to 1993. He is currently a principal of Hochman, Salkin, Rettig, Toscher & Perez, P.C.

Richard J. Sapinski served as Special Trial Attorney in the IRS Office of the Regional Counsel (Philadelphia, Pa.) from 1984 to 1986 and Special Trial Attorney (International) from 1986 to 1987. He also served as a Trial Attorney in the IRS Office of the District Counsel (Newark, N.J.) from 1977 to 1984. He is currently a member of Sills, Cummis & Gross P.C.

Richard G. Stack served in the IRS Office of Chief Counsel from 1988 to 1991. He then served as an Assistant United States Attorney in the Tax Division with the United States Attorney's Office from 1991 to 2011. He is currently a member of the Brager Tax Law Group, A P.C.

Justin A. Thornton served as a Senior Trial Attorney in the Tax Division of the U.S. Department of Justice from 1979 to 1987. He currently maintains a private practice at the Law Offices of Justin Thornton in Washington, D.C.

Steven Toscher served as a Trial Attorney with the Tax Division of the U.S. Department of Justice,

representing the United States in tax litigation matters from 1979 to 1983. In 1982, Mr. Toscher received the U.S. Department of Justice Outstanding Attorney Award. He is currently a principal of Hochman, Salkin, Rettig, Toscher & Perez, P.C.

Josh O. Ungerman served as Senior Trial Attorney in the IRS Office of District Counsel from 1992 to 1994. He also served as Special Assistant U.S. Attorney in the Tax Division of the U.S. Department of Justice from 1992 to 1994. He is currently a partner with Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P.

John M. Youngquist served as Chief of the Tax Division in the U.S. Attorney's Office for the Northern District of California from 1969 to 1978, and as Assistant U.S. Attorney from 1964 to 1978. He also served as a Trial Attorney in the Tax Division of the U.S. Department of Justice from 1962 to 1964. He currently maintains a private legal practice in San Francisco, California.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-60089-CR-COHN

UNITED STATES OF AMERICA,

vs.

ROBERT MORAN,

Defendant.

PLEA AGREEMENT

The United States of America and Robert Moran (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to count one of the Information, which charges the defendant with willfully filing a false tax return, in violation of Title 26, United States Code, Section 7206(1).

2. The defendant is aware that the sentence will be imposed by the court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentence under the Sentencing Guidelines and that

the applicable guidelines will be determined by the court relying in part on the results of a Pre-Sentence Investigation by the court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

3. The defendant also understands and acknowledges that the court may impose a statutory maximum term of imprisonment of up to three years, followed by a term of supervised release of up to one year. In addition to a term of imprisonment and supervised release, the court may impose a fine of up to $250,000.

4. The defendant further understand and acknowledges that, in addition to any sentence imposed under paragraph 3 of this agreement, a special assessment in the amount of $100 will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. The Office of the United States Attorney for the Southern District of Florida and the United States Department of Justice Tax Division (hereinafter "United States") reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, the United States further reserves the right to make any recommendation as to the quality and quantity of punishment.

6. The United States agrees that it will recommend at sentencing that the court reduce by two levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the defendant's offense level is determined to be 16 or greater, the United States will make a motion requesting an additional one

level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the United States to avoid preparing for trial and permitting the United States and the court to allocate their resources efficiently. The United States further agrees to recommend that the defendant be sentenced at the low end of the guideline range, as that range is determined by the court. The United States, however, will not be required to make this motion and this recommendation if the defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the United States prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

7. The United States and the defendant agree that, although not binding on the probation office or the Court, they will jointly recommend that the Court make the following findings and conclusions as to the sentence to be imposed:

a. Tax Loss: The relevant amount of actual, probable, or intended tax loss under Section 2Tl.l of the Sentencing Guidelines resulting from the offense committed in this case and all relevant conduct is the tax loss associated with accounts at UBS in which the defendant was the beneficial owner of for tax years 2001 through 2007.

b. Sophisticated Means: The offense involved sophisticated means, which results in a two-level offense increase.

8. A. The defendant agrees to cooperate with the Internal Revenue Service ("IRS") in its civil examination, determination, assessment, and collection of income taxes related to his 2001 through 2007 income tax returns and any related corporate/entity tax returns, and further agrees not to conceal, transfer, or dissipate funds or property that could be used to satisfy such taxes, penalties, and interest. The defendant agrees to provide the IRS any documentation in the defendant's possession and/or control requested by the IRS in connection with its civil examination, determination, assessment, and collection of such income taxes prior to sentencing.

B. The defendant also agrees to work diligently with the Internal Revenue Service to resolve the liability for all taxes, interest, and penalties due and owing to the IRS, including all taxes, interest, and penalties on his individual and any related corporate/entity liabilities for the tax years 2001 through 2007. Nothing in this agreement shall limit the IRS in its civil determination, assessment, and collection of any taxes, interest, and/or penalties that the defendant may owe.

C. The defendant agrees that any statements made by him to the IRS and/or in this agreement shall be admissible against the defendant without any limitation in any civil or criminal proceeding and the defendant stipulates to the authenticity and admissibility, in any civil or criminal proceeding, of any documentation provided by the defendant to the IRS. The defendant hereby waives any protection afforded by Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure with regard to any such statements and documentation. In the event that the defendant withdraws from this agreement prior to pleading guilty and/or fails to fully comply with any of the terms of this agreement, the United States will, at its option, be released from its obligations under this agreement, but under no circumstances shall the defendant be released from the agreements and waivers made by him in this and the preceding two paragraphs.

9. The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or a variance from the guideline range that the court establishes at sentencing. The defendant further understands that nothing in this agreement shall affect the United States's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that he has discussed the appeal waiver set forth in this agreement with his attorney. The defendant further agrees, together with the United States, to request that the district court enter a specific finding that the defendant's waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

10. The defendant is aware that the sentence has not yet been determined by the court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the

defendant may receive, whether that estimate comes from the defendant's attorney, the United States, or the probation office, is a prediction, not a promise, and is not binding on the United States, the probation office or the court. The defendant understands further that any recommendation that the United States makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 2 above, that the defendant may not withdraw his plea based upon the court's decision not to accept a sentencing recommendation made by the defendant, the United States, or a recommendation made jointly by both the defendant and the United States.

11. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings unless contained in a letter from the United States Attorney's Office executed by all parties and counsel prior to the change of plea.

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

Date: 4/14/09 By: S/ Kevin Downing

KEVIN DOWNING
SENIOR TRIAL ATTORNEY
MICHAEL P. BEN'ARY
TRIAL ATTORNEY
UNITED STATES
DEPARTMENT OF JUSTICE
TAX DIVISION

Date: 4/14/09 By: S/ Jeffrey A. Neiman
JEFFREY A. NEIMAN
ASSISTANT UNITED STATES
ATTORNEY

Date: 4/14/09 By: S/ William B. McCarthy/
WILLIAM B. MCCARTHY
GARY M. BAGLIEBTER
ATTORNEYS FOR DEFENDANT

Date: 4/14/09 By: S/ Robert Moran
ROBERT MORAN
DEFENDANT