IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	**Case No. 1:12-CR-434 (LMB)**
SOOKYEONG KIM SEBOLD,	)	**Trial date: Dec. 11, 2012**
a/k/a Sophia Kim	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF ADDITIONAL AUTHORITIES IN SUPPORT OF RULE 29 MOTION

Defendant, Ms. Sookyeong Kim Sebold a/k/a Ms Sophia Kim (hereinafter "Ms. Kim"), by and though counsel, hereby submits this memorandum of additional legal authorities in support of entry of judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

I. CASE LAW SUPPORTS DISMISSAL UNDER THESE FACTS.

To act willfully means to act voluntarily and deliberately and to intend to violate a known legal duty. In this case, the legal duty at issue with respect to both Counts is the common law requirement that embezzled funds must be reported as taxable income. *See James v. United States*, 366 U.S. 213, 219 (1961).[1]

Case law supports dismissing this case pursuant to Rule 29. For example, the facts of *United States v. Middlemiss*, Crim. No. 77-5, 1977 WL 1129 (D.N.H. Mar. 9, 1977), are strikingly similar to this case. Ms. Middlemiss, a high school graduate with no accounting or tax training, was the

[1] The tax code broadly defines "gross income" as meaning "all income from whatever source derived." 26 U.S.C. § 61. Section 61 lists several categories of funds that fall within this definition, such as rents and dividends. However, it does not specify "embezzled funds" as a category of funds that constitutes "gross income." Although in 1961 the Supreme Court held in *James* that embezzled funds constitute taxable income, this rule has never been codified into the tax code.

head bookkeeper of a company from which she embezzled funds. *Id*. at 1-2. The government alleged that the defendant willfully failed to report the embezzled funds on her tax return, while the defendant claimed that she "did not know that embezzled funds should be included as taxable income." *Id*. at *1. Both parties agreed that the issue was solely that of intent. *Id*.

In *Middlemiss*, the district court first noted that while the defendant was "clearly guilty of embezzlement, that is not the crime with which she is charged before this court." *Id.* at *3. The court then turned to the issue of willfulness and whether Ms. Middlemiss knew that the money she embezzled from her employer had to be reported on her tax returns:

> The Supreme Court has twice made scholarly journeys into the nether world of whether embezzled funds are income. See James v. United States [61-1 USTC P 9449], 366 U.S. 213 (1961), and Commissioner v. Wilcox [46-1 USTC P 9188], 327 U. S. 404 (1946). It came up with two different conclusions, neither one of them unanimous. In the light of the failure of the Supreme Court to decipher, with unerring accuracy, the vagaries of this aspect of the Internal Revenue Code, it is not unlikely that the defendant, who probably never considered the issue at all, was quite unaware that the Government had commanded, in effect, that she confess to the embezzlement notwithstanding her right against self-incrimination. Id. at *3.

As the *Middlemiss* Court made clear, a defendant's mere omission to report unearned income is insufficient to establish a violation of § 7206(1); the government must instead prove that the defendant "made a knowing attempt to defraud the Government." *Id*. at *1. The government's failure to do so in *Middlemiss* resulted in the defendant's acquittal.

The failure of the government to establish Ms. Kim's knowledge of the tax law can also be seen by comparing this case to ones where Courts have found sufficient evidence to support a jury determination of willfulness. For example, the Fourth Circuit in *Kotmair* found sufficient evidence for a jury to infer willful failure to file a tax return where, inter alia, the defendant had been notified

by the IRS of his duty to file a tax return and defendant's father had gone to jail for failure to file a tax return. *United States v. Kotmair*, 11 F. App'x 109, 111 (4th Cir. 2001); *see also United States v. Shivers*, 788 F.2d 1046, 1048 (5th Cir. 1986) (finding sufficient evidence to infer willfulness where defendant received a letter from the IRS stating that "'[f]ailure to file a required return may subject you to prosecution under . . . section 7203.'"). By contrast, Agent Porter testified during trial that in the interview of Ms. Kim in August 2006, Agent Porter did not discuss embezzlement and did not inform Ms. Kim of her legal duty to disclose embezzled funds on a tax return.

Courts have also affirmed the sufficiency of the evidence where a defendant's advanced training or sophisticated knowledge supports an inference of willfulness. As established by the testimony of government witnesses, Ms. Kim is a high school graduate with no college degree and no specialized training in accounting or tax. *See, e.g., United States v. Diamond*, 788 F.2d 1025, 1026 (4th Cir. 1986) (finding sufficient evidence for trial court to find a § 7206(1) violation where defendant was a certified public accountant, held a combined Master's of Business Administration and Law degree from Columbia University and an advanced degree in tax law from New York University); *United States v. Ostendorff*, 371 F.2d 729, 731 (4th Cir. 1967) (noting that defendant, a college graduate with special knowledge of accounting and insurance, admitted in his testimony that he "of course" knew that the law required him to file tax returns); *United States v. Alexander*, 173 F. App'x 558, 559 (9th Cir. 2006) (finding a willful omission of commission income in violation of § 7206(1) where the defendant was sophisticated in tax matters, held a law degree and a masters in business administration, was licensed as a real estate broker, and told an IRS agent that he considered his commission to be income).

Finally, the government's evidence that Ms. Kim had knowledge of **other tax laws**, such as the requirement to report gambling winnings as income, is **pure speculation** – not evidence that she knew the tax rule at issue in this case. As the Third Circuit instructed in a criminal tax case long ago, "[s]peculation and intuition cannot be substituted for proof. That is so even on the civil side in tax cases where the burden of proof upon the government is less than that which prevails in criminal tax cases." *United States v. Pechenik,* 236 F.2d 844, 847 (3rd Cir. 1956).

II. THE GOVERNMENT'S "DOMINION AND CONTROL" ARGUMENT IS INAPPOSITE.

It appears that, because it lacks evidence that Ms. Kim knew embezzled funds constituted taxable income, the government is attempting to adopt an alternative theory of the case, i.e. that it must merely show Ms. Kim exercised "dominion and control" over the funds in question. There are several problems with this argument.

First, if the government's "dominion and control" theory were correct, then every employee who was entrusted with funds from an employer would have declare those funds as personal income. For example, if a business gives $1,000 in cash to its office manager to use for office expenses, and she keeps that cash in her personal pocketbook, then she would be exercising "dominion and control" over that cash. However, it cannot be that such an employee is required to report the $1,000 on her personal income taxes. If this were the rule, then every employee entrusted with "control" over company funds would be violating the tax laws.

Second, the case law cited by the government does not support its sweeping "dominion and control" theory. In its proposed jury instruction 37, the government lifts the following language **out-of-context** from the Supreme Court's 1952 decision in *Rutkin v. United States*: "An unlawful gain,

as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." 343 U.S. 130, 137 (1952). Although this quote is accurately lifted from the *Rutkin* opinion, there is nothing in *Rutkin* that stands for the sweeping proposition that a person is subject to personal income tax every time he exercises "dominion and control" over funds. Rather, at issue in *Rutkin* was whether funds gained by extortion constituted taxable income – an issue the Court had never decided up to that point. To support its conclusion that extorted funds should be taxed, the Court included the above-quoted language. Extortion is not an issue in this case and the *Rutkin* Court did not hold that every time a person is subject to taxation every time exercises dominion and control over funds. The other cases cited in the government's proposed jury instruction 37 are likewise inapposite.

Finally, if the Court were to adopt the government's new "dominion and control" theory, the end result would be an improper variance from the indictment. A defendant may be tried only on the charges named in the indictment that the grand jury has approved. *Stirone v. United States*, 361 U.S. 212, 215-16 (1960); *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991). The evidence, arguments of the prosecutor, or jury instructions may not broaden the basis for conviction without running afoul of the Fifth Amendment. *Stirone*, 361 U.S. at 217; *United States v. Floresca*, 38 F.3d 706, 710-11 (4th Cir. 1994). Only the grand jury may broaden the bases for convicting the defendant. *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999). If the basis for conviction is broadened beyond the subject of the grand jury's indictment, a constructive amendment occurs and that constructive amendment is "error per se." *Id*.

Here, the government clearly charged Ms. Kim under an embezzlement theory. **The words "embezzle," "embezzled," or "embezzlement" appear 19 times in the indictment.** The general

allegations make clear that the government's theory of the case is that Ms. Kim embezzled money from her employer. *See* Superseding Indictment ¶¶ 4-6. The indictment repeats those general allegations in each count. Consistent with the indictment, the government has attempted at trial to portray Ms. Kim as embezzling money from KCFF while Dr. Pak was imprisoned. The government has picked their theory of the case, and should not be allowed to vary from the indictment by waiting to trial to charge a new "dominion and control" theory.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2012, I will electronically file the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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Pursuant to the Electronic Case Filing Policies and Procedures, a courtesy copy of the foregoing pleading will be delivered to Chambers within one business day of the electronic filing.

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