NO. 10-30185
Consolidated with Nos. 10-30186, 10-30187 & 10-30188

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

C. MARVIN WILBUR,

Appellant

REPLY BRIEF OF APPELLANT MARVIN WILBUR, SR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
NO. CR09-00191 MJP, THE HONORABLE MARSHA PECHMAN.

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A. INTRODUCTION TO REPLY BRIEF ARGUMENT

To be guilty of an offense under the Contraband Cigarette Tax Act, there must be contraband cigarettes. Congress defined that term to mean cigarettes "which do not bear evidence of payment of an applicable state tax." 18 U.S.C. § 2341. There are three specific tax retrocession statutes each of which unambiguously states that there are no state taxes on cigarettes "during the effective period of a cigarette tax contract."[1] In addition, there are no less than six other statutes[2] which provide that no state taxes are to be collected, and no state cigarette tax stamps are required, in Indian country covered by a contract between Washington State and an Indian tribe. Nevertheless, the United States ignores all nine statutes, plus the specific tax retrocession provision of the Contract between Washington and the Swinomish Tribe, in a labored attempt to persuade this Court that there *was* an applicable state cigarette tax during the effective period of this Contract (which is still in effect today), which the Wilburs did not pay.

The Government's position requires a "suspension of disbelief"[3] that evens the most indulgent of readers would have difficulty mustering. Desperately trying to

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[1] RCW 82.08.0316; RCW 82.12.0316; and RCW 82.24.295(1).

[2] RCW 43.06.455; RCW 43.06.460; RCW 82.24.030(5); RCW 82.24.040(6); and RCW 82.24.080(4).

[3] This term, coined by Samuel Taylor Coleridge, is defined as "a willingness to suspend one's critical faculties and believe the unbelievable." http://dictionary.reference.com/browse/suspension+of+disbelief.

manufacture a convincing argument, the Government attempts to rely on a "clarifying" amendment that was passed in 2008, long after the conduct forming the basis for the criminal charge had ended. The Government asserts that prior to this amendment, the tax retrocession statutes were not even ambiguous, because they were not even susceptible to the interpretation that no state cigarette taxes were to be collected during the existence of a cigarette tax contract. In conflict with its own assertion on this issue of potential ambiguity, the Government argues that a 2008 amendment to RCW 82.24.020 "clarified" that state cigarette taxes *were* to be collected during the effective period of a cigarette tax contract, even though the amending law that it relies upon never mention taxes of any kind, and even though the very same 2008 law also amended another statute by explicitly stating that it was "the intent of the legislature" to collect applicable state taxes on cigarettes "in the absence of a cigarette tax contract" between a tribe and the State. Laws of 2008, ch. 226, § 2, amending RCW 82.24.080 by adding new subsection (4).

B. ARGUMENT

1. SINCE THERE WAS NO APPLICABLE STATE TAX AFTER OCTOBER 2003, THE WILBURS CANNOT BE GUILTY OF A CONSPIRACY NOT TO PAY AN APPLICABLE STATE TAX AFTER THAT DATE.

a. There Is No Conflict Between the Retrocession Statutes and Part V(6) of the Cigarette Tax Contract.

Three Washington statutes all specifically state that "**during the effective period of a cigarette tax contract**":

- the "tax levied by RCW 82.08.020 **does not apply** to sales of cigarettes," (RCW 82.08.0316)(retail sales tax);
- "the provisions of this chapter **shall not apply** in respect to the use of cigarettes," (RCW 82.12.0316)(use tax); and
- "the taxes imposed by this chapter **do not apply** to the sale, use, consumption, handling, possession, or distribution of cigarettes," (RCW 82.24.295(1))(excise tax).

The Government *fails to mention* any of these three statutes. Instead, it argues that (a) Part V(6) of the Contract between the Swinomish Tribe and Washington State "conflicts" with some unidentified statutory provisions of Washington law; and (b) that pursuant to a new statutory subsection enacted by the Laws of 2008, ch. 226, § 3, Part V(6) supersedes the unidentified "conflicting" Washington statutes. Five

years after the 2003 cigarette tax contract between the Swinomish Tribe and the State of Washington went into effect, and more than one year after the charged period of criminal conduct had ended, the Washington Legislature added subsection (7) to RCW 82.24.020. That new subsection, which took effect on June 12, 2008, provides:

> If the state enters into any cigarette contract or agreement with a federally recognized Indian tribe under chapter 43.06 RCW, the terms of the contract or agreement shall take precedence ***over any conflicting provisions*** of this chapter while the contract or agreement is in effect.

RCW 82.24.020(7) (emphasis added). [4]

The Government purports to rely on this 2008 statute, and on Part V(6) of the Contract which provides:

> As to all transactions that conform with the requirements of this Contract, such transactions do not violate state law, and the State agrees that it will not assert that any such transactions violate state law for the purpose of [the CCTA] or other federal law specifically based on violation of state cigarette laws.

ER 57.

The Government contends that Part V(6) of the Contract takes precedence over conflicting statutory provisions, but it does so *without ever identifying what those statutory provisions are, or what the conflict is* between them and Part V(6). Remarkably, the Government strains to evade the clear language of the three

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[4] A subsequent amendment in 2010 changed the numbering of the statutes subsections so that it is now subsection (5). Laws of 2010, 1st Sp. Sess., ch. 22, § 2.

retrocession statutes, RCW 82.08.0316, 82.12.0316, and 82.24.295, by not even mentioning the existence of any of them.

b. Part V(6) Never Mentions Any Tax of Any Kind, and Never Mentions "Nonconforming" Transactions.

When the statutory language of the three tax retrocession statutes is compared to the language of Part V(6) of the Contract, it is clear that there is no conflict. Each of the three statutes unambiguously states that "during the effective period of a cigarette tax contract" the cigarette taxes provided for in these three chapters of RCW Title 82 do "not apply." But *nothing* in Part V(6) of the Contract even mentions a cigarette tax of any kind. *Nothing* in Part V(6) says that any kind of tax "does apply." Moreover, the subject of Part V(6) is "all transactions that conform with the requirements of this contract." *Nothing* in Part V(6) refers to transactions which do "*not conform*" with the requirements of the Contract. For transactions that *do* conform, the State of Washington promises not to make the *assertion* that such transactions violate state law. But for transactions which do *not* conform, the State makes no promise of any kind, and indeed, nonconforming transactions are simply not mentioned at all.

c. Although Part V(6) Contains a Promise by Washington Not to "Assert" Any Violation of State Law for Conforming Transactions, It Says Absolutely Nothing About Any "Converse" Agreement by the Tribe to Treat Nonconforming Transactions as Violations of State Law.

Despite the fact that the Contract is *silent* about nonconforming transactions, the Government simply asserts that the contracting parties agreed to a "converse" proposition about nonconforming transactions:

> The converse is also true, transactions that do not conform to the Tax Contract's requirements do violate State cigarette laws – because the State has not retroceded its taxing authority over nonconforming sales – and, in requisite amounts, the CCTA.

Brief of Appellee, at 23. Noticeably, the Government cites *nothing* in support of this proposition.

Moreover, this assertion is demonstrably false. The three retrocession statutes do not limit their retrocession to conforming sales. In fact, none of these statutes contains either the word "conforming" or "non-conforming". None places any limiting condition on the existence of the tax retrocession "during the effective period of a cigarette tax contract."

In addition, the Government simply fails to recognize that even if the Contract had included language which specifically reserved to the State the right to "**assert**" that nonconforming sales "**violate**" state law, that would *not be the equivalent* of reserving the right to **collect a tax**.

Finally, the Government ignores the fact that Part V(6) only includes a

promise *by one party* -- the State of Washington – that it will not "assert" that "conforming" sales violate any state law. The Government argues that Part V(6) of the Contract therefore shows that the Swinomish Tribe *agreed* with the State that *non*conforming sales (which are not mentioned) *do* violate state laws:

> [I]f the Tax Contract were designed to retrocede state taxation authority over every transaction on Swinomish land during its effective period, there would be no need for the parties to define *and agree* which transactions are in violation of state and federal law..

Brief of Appellee, at 27-28 (italics added). And yet Part V(6) does not say anything at all about what *the Tribe* agrees to, or about what *the Tribe* thinks about the legal status of nonconforming sales. All it says is that "*the State* agrees that it will not ***assert*** that such transactions [conforming sales] violate state law . . ." (Emphasis added).

The Government portrays Part V(6) as including an expression of ***the Tribe's agreement*** with its position that "nonconforming" sales do violate state law. But this contention conflicts with Part XII(1) of the Contract which explicitly states that ***the Tribe does not agree*** that ***any*** of the State's tax laws apply to the Tribe or to its members:

> By entering into this Contract, the Tribe ***does not concede that the laws of the State of Washington***, including its tax and tax collection provisions, ***apply to the Tribe, its members or agents*** regarding activities and conduct within or without Indian country.

CTC Part XII(1) (emphasis added). ER 64.

d. <u>The Government Ignores Additional Amendments Contained in the 2008 Legislation Which Explicitly Reassert the State's Tax Retrocession So Long as There is an Existing Cigarette Tax Contract</u>.

Although the Government purports to rely on a clarifying amendment to RCW 82.24.020 passed by Laws of 2008, ch. 226, it studiously ignores a key part of the 2008 legislation. Section 2 of the 2008 law also added subsection (4) to RCW 82.24.080 and which states in pertinent part:

> It is the intent of the legislature that ***in the absence of a cigarette tax contract*** or agreement under chapter 43.06, applicable taxes imposed by this chapter be collected on cigarettes sold by an Indian tribal organization to any person who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place consistent with collection of these taxes generally within the state. . . .

(Emphasis added). It is harder to imagine a more explicit restatement of the legislative policy to retrocede from the collection of cigarette taxes during the existence of a cigarette tax contract, than this explicit statement that such taxes shall only be collected "in the absence of a cigarette tax contract." The Government simply ignores this new section because it fatally undermines its argument that enactment of § 3 meant that cigarette taxes should be collected and are owed on all nonconforming transactions.

e. The Government Misrepresents the Language of the Contract In Order to Make It Appear That the Contract Supports Its Conditional Tax Retrocession Theory.

Citing to ER 54, the Government makes the following representation to this Court:

> With respect to conforming transactions, the Tax Contract conditions retrocession "on the imposition of the Tribal cigarette tax," which must "apply to the retail sale of cigarettes by Tribal Retailers." ER 54.

Brief of Appellee, at 24. But examination of the actual contract language reveals that this is a blatant misrepresentation of the Contract. The truth of the matter is that the cleverly quoted language comes from Part II(2) of the CTC, entitled "Applicability of the Contract." Nowhere in the language of this section is there any mention of "conforming transactions," or of any type of "retrocession," either conditional or unconditional. The actual language of the first sentence of this section is as follows:

> From its execution, and **contingent on the imposition of the Tribal cigarette tax** pursuant to a Tribal ordinance meeting the terms of Part III of this Contract, **this Contract shall apply** to a retail sale of cigarettes by Tribal Retailers.

(Emphasis added).

The manipulation and distortion of this sentence by the Government is remarkable. There *is* a discussion of a contingency or a "condition," that must be fulfilled before something else happens. But the condition is *not* whether a particular sale of cigarettes conforms to the contract, and it is *not* whether the cigarettes in

question have a tribal tax stamp affixed to them. Instead, the condition is whether the Tribe has enacted an ordinance which imposes a Tribal cigarette tax.

Having misrepresented the type of "condition" that the Contract is talking about in Part II(2), the Government then claims that the tax retrocession is contingent upon fulfillment of this condition. But in fact, the subject of the phrase "apply to the retail sale of cigarettes by Tribal retailers" is "this Contract" – ***not*** "retrocession." By substituting "conforming transactions" for "a Tribal ordinance" which imposes a tribal tax, and by changing the words "this Contract" to the word "retrocession," the Government has completely changed the meaning of this contract provision so that it will seem to support its argument. By this sleight of hand, a statement that the Contract won't go into effect until the Tribe passes a Tribal tax ordinance is transformed into a false statement that the tax retrocession is contingent upon whether or not a particular sale of cigarettes conforms to all of the requirements of the Contract.

f. The Contention That Part V(6) Makes The Tax Retrocession Conditionally Dependent, On a Sale by Sale Basis, Upon Whether Each Individual Sale "Conforms" to the Contract, Conflicts With Part III(2e) of the Contract, Which Expressly States That There is a Tax Retrocession "During the Time This Contract Is In Effect".

The Contract itself has a provision that explicitly recognizes the State's tax retrocession. The Government doesn't like to draw attention to it, however, because this contract provision makes no mention of either "conforming sales" or "non-

conforming sales," and it does not condition the tax retrocession on the "Indian retailer" status of the party found to have possessed or sold cigarettes. Instead, Part III (2e) simply states:

> Pursuant to RCW 43.06.455, the State retrocedes from its tax during the time that this Contract is in effect.

Nevertheless, the Government argues that Part V(6) recognizes a *conditional* tax retrocession which is dependent on the requirement that the cigarette transaction in question "conform with the requirements of this Contract." If the State's tax retrocession were truly conditioned on such conformity with the contract, wouldn't that condition be included in the part of the Contract which explicitly recognizes the State's tax retrocession? And even assuming there was some kind of conflict between Part V(6) and Part III(2e), wouldn't the latter provision control the scope of the tax retrocession since it is the only provision in the CTC that mentions the State's tax retrocession?

g. The Contract Specifically Provides a Mechanism For Terminating the Contract, And Thus for Ending the Tax Retrocession. The United States Ignores These Contractual Provisions Because It Wishes to Persuade This Court That The Tax Retrocession Is Constantly Being Turned Off -- For Each Transaction That Is Non-Conforming -- and Then Back On Again -- for Each Transaction That Is Conforming.

In his opening brief Marvin Wilbur noted that Part VIII(6) of the Contract specifically provides a mechanism to terminate the Contract. Certain kinds of violations, and "only" those listed violations, are identified as grounds for Contract

termination, *provided* a mediation process is employed and the mediator finds that that the for-cause violation was in fact committed. One of the enumerated "for cause" grounds for contract termination is the "[r]etail sale of unstamped cigarettes during the effective period of a Tribal cigarette tax." Part VIII, ¶ 6(a).[5] Of course once the Contract is terminated by the mediator's decision, the parties are no longer in "the effective period of a cigarette tax contract," and thus the tax retrocessions effected by RCW 82.08.0316, 82.12.0316, and 82.24.295, are also terminated at this point in time.

The Government, however, would have this Court believe that every time a nonconforming sale is made, the tax retrocessions effected by the three state tax retrocession statutes get turned off for that particular sale. If this were the case, the termination provisions of Part VIII(6) would be meaningless. The State would not have to provide notice of a "for cause termination" and would not have to "provide a written recitation of the facts" to the mediator. *Id.* There would be no occasions for the responding party – the Tribe – to submit its version of the facts to the mediator, as

[5] The State can also chose to employ "the regular dispute resolution process" to try and find an agreed solution to the problem of the sale of unstamped cigarettes. Part VIII(6). The regular dispute resolution process, which is governed by Part VIII(1),(2), (3), & (4), can, but need not, utilize a mediator. Under Part VIII(4): "If, after no more than eight months from the initial notice of a violation, the parties are unable to resolve a disagreement regarding an alleged violation," through the use of the regular dispute resolution process, then "this Contract may be terminated."

called for by Part VIII(6), or for the mediator to make a decision. The Government has provided no explanation as to why the mediation and termination provisions of the Contract should be disregarded in this fashion.

The Government's theory of "on-again-off-again" tax retrocession also ignores the statutory command of the Washington Legislature that every cigarette tax contract *shall* contain dispute resolution procedures which must be followed before a contract can be terminated. Subsection (13) of RCW 43.06.455 states in pertinent part:

> Each cigarette tax contract **shall contain** a procedure for notifying the other party that a violation has occurred, **a procedure for establishing whether a violation has in fact occurred**, an opportunity to correct such violation, **and a provision providing for termination of the contract should the violation fail to be resolved through this process**, such termination subject to mediation should the terms of the contract so allow.

RCW 43.06.455(13)(emphasis added). This language makes it clear that a governor may *not* enter into a contract that does not contain such a procedure for resolving disputes over whether a violation has occurred. The statute mandates that contract termination only results "should the violation fail to be resolved through this process" of dispute resolution. RCW 43.06.455(13).

In the present case no notice of violation was ever given, no mediation process was ever utilized, and no mediator ever determined that a violation had occurred. The Government simply disregards the statutory requirement that there can be no

termination of a cigarette tax contract unless a dispute resolution procedure has been tried and has failed. Ignoring this statutory requirement, the Government simply asserts that the statutory tax retrocessions of RCW 82.08.0316, 82.12.0316, and 82.24.295(1), were not in effect when the Wilburs acted, because (allegedly) the Trading Post was not an "Indian retailer," and thus their cigarette transactions were nonconforming transactions.

h. The Government Concedes That The Cigarettes At Issue Here Were Possessed and Sold By an Indian Business on Land Held in Trust For a Tribal Member. Although this Concession Makes the Trading Post An "Indian Retailer" Under the Statute, RCW 43.06.455(14)(b)(iii), the Government Contends That The Contract Permissibly Narrowed the Scope of the Definition of an "Indian Retailer" To Exclude The Third Statutory Definition.

According to the Government, the tax retrocession is conditioned upon The Trading Post being an "Indian Retailer," and it claims that it was an "Indian Retailer" for *part* of the charged time period. The Government concedes that up until March 28, 2005 when The Trading Post ceased to be licensed by the Tribe to sell cigarettes, The Trading Post was an "Indian Retailer" under the *second* definition of that term given in RCW 43.06.455(14)(b)(ii). *Brief of Appellee*, at 25. But after March 28, 2005, the Government contends it was no longer an "Indian Retailer." *Id.* at 32-33, 37.

The Wilburs contend that The Trading Post continued to be an "Indian Retailer" after March 28, 2005, because it *also* met the third alternate statutory definition of an

"Indian Retailer." Because the cigarettes possessed and sold were at the Trading Post -- a business owned and operated by, and located on land held in trust for a tribal member – the Trading Post was *also* an Indian Retailer under subsection (b)(iii) of RCW 43.06.455(14).

The Government does not contest the fact that the Trading Post was owned and operated by an Indian on land held in trust for him.[6] But it argues that because the Contract negotiated by the Governor with the Swinomish Tribe does not employ this third alternate *statutory* definition of "Indian Retailer," The Trading Post cannot qualify as an "Indian Retailer" *under the Contract*. The Government contends that the Governor and an Indian tribe may legally enter into a Contract that is "narrower in scope" than that provided for by Washington's statutes, *Brief of Appellee*, at 29; therefore "the governor was free to negotiate a tax contract which limits the State's tax retrocession to only a subset of Indian retailers." *Brief of Appellee*, at 42.

But this convenient assumption, that the Governor is legally permitted to ignore the third statutory definition of "Indian Retailer," is in direct conflict with RCW

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[6] The Government does argue that it is *not* sufficient if only one of the owners and operators of the business is an Indian and a tribal member. But this argument ignores the definition of an Indian organization contained in WAC 458-20-192(5)(d) and the fact that the company which asserted ownership over the cigarettes (but not over the land on which the Trading Post was situated) was operated by Marvin Wilbur and by Joan Wilbur, his wife. This WAC provides that a "corporation comprised solely of Indians is not subject to tax on business

43.06.455(14) itself. The very first words of subsection (14) declare that "***For purposes of*** this section and . . . ***RCW 82.08.0316, 82.12.0316, and 82.24.295***" -- ***the three tax retrocession statutes*** -- the term "Indian Retailer" has three alternate meanings, the last of which covers Marvin Wilbur's business, The Trading Post.

i. The Legislature Expressly Forbade the Governor From Entering Into Contracts That Provided For Tax Retrocessions Narrower In Scope Than The Retrocessions Enacted by the Legislature. RCW 43.06.455 Explicitly Requires All Negotiated Contracts to Comply With All of the Requirements of that Statute. One of those Express Requirements Is that for Purposes of the Three Tax Retrocession Statutes, All Contracts *Must* Use the Legislature's Definition of "Indian Retailer".

The Government claims that "the Wilburs have cited no authority for the proposition that the State lacks authority to enter into a more narrow contract than what the enabling statute authorized." *Brief of Appellee*, at 28. But this is demonstrably false. The Wilburs cited to subsection (1) of RCW 43.06.455. The Government simply ignores this provision of the statute. RCW 43.06.455(1) states:

> The governor may enter into cigarette tax contracts concerning the sale of cigarettes. ***All*** cigarette tax contracts ***shall meet the requirements*** for cigarette tax contracts ***under this section***.

(Emphasis added).

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conducted in Indian country" if "at least fifty percent of the owners are members of the tribe," and Marvin Wilbur makes up half his marital community.

One of those requirements, set forth at the beginning of subsection (14), explicitly cross-references the tax retrocession statutes. Before it proceeds to give definitions for the term "Indian Retailer," RCW 43.06.455(14) begins with these words:

> For purposes of this section and RCW 43.06.460, 82.08.0316, 82.12.0316, and 82.24.295: . . .

Subsection (14) then continues by providing definitions of the terms "essential government services," "Indian retailer," and "Indian tribe." Thus, the tripartite definition of the term "Indian retailer" – which explicitly includes "a business owned and operated by the Indian person or persons in whose name the land is held in trust," is both a requirement of RCW 43.06.455 which "all cigarette tax contracts shall meet" as specifically commanded by RCW 43.06.455(1), *and* a requirement of the tax retrocession statutes themselves by virtue of subsection (14).

In sum, in order to make the argument that the Governor is free to disregard the third statutory definition of "Indian retailer," and that he can enter into contracts that contain "narrower" definitions of such terms, the Government simply has to ignore these statutory provisions.[7] And so it has.

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[7] The Wilburs also cited specifically to RCW 43.06.455(2) which states: "A cigarette tax contract with a tribe ***shall*** provide for a tribal cigarette tax ***in lieu of all*** state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian Country by Indian retailers." (Emphasis added). They also cited to *S.S. Mullen v. Marshland Flood Control District*, 67 Wn.2d 461, 407 P.2d 990 (1965), for the proposition that a law that refers to "all" taxes does not allow for a construction that permits any tax to fall outside its scope. *See also* RCW 43.06.460 ("The tribal

j. Conclusion: There Are No Applicable State Taxes and Therefore the Cigarettes Were Not Contraband.

In order to violate the CCTA there has to be an "applicable state tax" and cigarettes which do not bear evidence of payment of such a tax. 18 U.S.C. § 2341. Therefore, to uphold the Wilburs' convictions, the Government must somehow persuade this Court that there continued to be such an applicable state tax after the cigarette tax contract between the Swinomish Tribe and the State of Washington took effect on October 3, 2003.

This it cannot and has not done. The language of Part V(6) of the Contract does not nullify the clear directive of the three explicit tax retrocession statutes, RCW 82.08.0316, 82.12.0316, and 82.24.295. Nor does it nullify the language of RCW 82.24.080(4) ("It is the intent of the legislature that, in the absence of a cigarette tax contract . . ., applicable taxes . . . be collected . . ."). Nor does it dispense with any of the specific commands of subsections (1), (3), (13) and (14), of RCW 43.06.455. Though it has tried, the Government simply cannot write all these laws out of existence.

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cigarette tax is in lieu of the state cigarette and state and local sales and use taxes, as provided in RCW 43.06.455(3)," and *Wilbur v. Locke,* 423 F.3d 1101, 1104 (9th Cir. 2005) ("cigarette tax contracts must provide that the state will not impose any tax . . .")

2. NOR WERE THE CIGARETTES CONTRABAND DUE TO LACK OF TRANSPORTATION NOTIFICATION BECAUSE THE LEGISLATURE EXPRESSLY EXEMPTED CIGARETTES IN INDIAN COUNTRY COVERED BY A CIGARETTE TAX CONTRACT FROM THAT REQUIREMENT.

Recognizing the possibility that it may fail to persuade this Court that Marvin Wilbur owed the State some "applicable tax" during the effective term of the cigarette tax contract, the Government seeks to salvage its convictions by offering an alternate theory as to why the cigarettes in question constituted contraband. The Government argues that "even if the Wilburs are correct that they were exempt from precollecting any taxes, their activities still ran afoul of the CCTA." *Brief of Appellee,* at 49. The Government argues that since the Wilburs never notified the State Liquor Control Board that unstamped cigarettes were being transported into the State, these cigarettes (1) were contraband under Washington State law; and (2) therefore, they were also contraband under federal law.

There are two fatal flaws in this argument. First, it is not true that everything that is contraband under state law is also contraband under federal law. Significantly, each time the Government asserts that cigarettes which were contraband under state law were also contraband under the CCTA, it fails to cite to anything to support that assertion. In fact, that assertion is simply false.

Federal law simply does *not* define contraband cigarettes as any cigarettes which are deemed contraband under state law. Congress could have defined "contraband cigarettes" in that manner, but it did not. 18 U.SC. § 2341 specifically defines the terms "contraband cigarettes" ***solely*** in terms of cigarettes "which bear no evidence of the payment of applicable State or local cigarette taxes. . ." Congress did not include cigarettes for which no advance notice of transportation was ever given. If there are no "applicable state or local cigarette taxes" for cigarettes, then as a matter of law those cigarettes simply cannot be contraband for purposes of 18 U.S.C. § 2341 & 2343.

Second, even if Congress had incorporated all cigarettes defined as contraband under State law into the definition of contraband cigarettes for federal CCTA purposes, cigarettes for which no transportation notice was given would *still* not constitute contraband cigarettes *because the Washington Legislature exempted cigarettes possessed in Indian country where there was a cigarette tax contract in effect from the requirement of giving pretransportation notice.*

Once again, the Government has ignored provisions of Washington statutory law. This time it points only to subsections (1) and (4) of RCW 82.24.250, because these subsections do require advance transportation notice, and do state that absent such notice cigarettes are deemed to be contraband under state law. But the Government fails to make any mention of subsection (8) of the same statute which was added by

Laws of 2003, ch. 114, § 8. This new subsection clarifies that neither the transportation notice requirement, nor anything else in RCW 82.24.250, applies to cigarettes covered by a cigarette tax contract:

> ***Nothing in this section*** shall be construed as limiting any otherwise lawful authority under a cigarette tax compact pursuant to 43.06 RCW.

RCW 82.24.250(8) (emphasis added). Thus the Legislature took care to state, in a law that took effect on July 27, 2003, several months before the Swinomish Tribe/Washington Contract went into effect, that Indian retailers operating under a cigarette tax contract did ***not*** have to comply with the transportation notice requirement.

Moreover, the 2003 law amended two other statutes in the same manner, explicitly making the point that state cigarette tax stamp requirements did ***not*** apply to cigarettes in Indian country covered by a cigarette tax contract. To both statutes Laws of 2003, ch. 114 added identical language identical to that which was added to RCW 82.24.250:

> Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

This same language was added to RCW 82.40.030 (as new subsection (5)) and 82.24.040 (as new subsection (6)).

Once again, the Government simply ignores the fact that the Washington Legislature specifically exempted cigarettes covered by cigarette tax contracts from all the state laws which pertained to state cigarette tax stamps, or to unstamped cigarettes. Since the Wilburs were *not* required by State law to give advance notice of the transportation of unstamped cigarettes, and were *not* forbidden by State law from possessing unstamped cigarettes, the cigarettes in question were not contraband under either state or federal law.

3. THE GOVERNMENT ATTEMPTS TO RELY ON A "CLARIFYING" AMENDMENT AT THE SAME TIME THAT IT INSISTS THERE IS NO AMBIGUITY IN THE LAW PERTAINING TO STATE TAXES ON CIGARETTES POSSESSED IN INDIAN COUNTRY COVERED BY A CIGARETTE TAX CONTRACT.

The parties could not be further apart on the issue of whether there is ambiguity in Washington's cigarette tax statutes. The Wilburs submit that several statutes unambiguously provide that there are no state taxes applicable to cigarettes possessed or sold in Indian country at a location covered by a cigarette tax contract between Washington State and an Indian tribe. This is clearly expressed in RCW 82.08.0316, RCW 82.12.0316, RCW 82.24.295(1) and RCW 82.24.080(4).

The United States takes the opposite position and asserts that there is no statutory ambiguity at all because RCW 82.24.020(7) provides that the provisions of a cigarette tax contract "take precedence over any conflicting provisions" of state cigarette tax law. Presumably, the Government means to say that Part V(6) of the

Contract is unambiguous, that it unambiguously conflicts with the state statutes which the Wilburs rely upon, and that therefore Part V(6) of the Contract clearly establishes that there were applicable state cigarette taxes owed for the cigarettes in question.

Thus each side asserts that Washington's cigarette tax statutes unambiguously support their position. Strangely, the Government asserts that a "clarifying" amendment to RCW 82.24.020 made in 2008 supports its view of Washington's tax retrocession statutes. Quoting from *United States v. Baker,* 63 F.3d 1478, 1487 (9th Cir. 1995), the Government notes that "[a] state legislature may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." But the Government seems oblivious to the contradiction inherent in its own argument. If the 2008 amendment was intended to "clarify" the law, or to correct a misinterpretation, by definition that means that the law was susceptible to two different reasonable interpretations and was therefore ambiguous.

The Government claims that by amending RCW 82.24.020 to add subsection (7), the legislature "clarified" that Washington's tax retrocession was to be implemented on a transaction by transaction basis, and that not all sales covered by a cigarette tax contract with an Indian tribe were exempt from state taxes. And yet the very same 2008 law that amended RCW 82.24.020 also amended RCW 82.24.080 by adding subsection (4) which states that it was the intent of the legislature that

cigarette taxes be collected "in the absence of a cigarette tax contract." Laws of 2008, ch. 226, § 2. So if the 2008 law did anything at all, it confirmed the Wilburs' construction of Washington's laws pertaining to cigarette taxes and cigarette tax contracts. After the effective date of this amending law, it is painfully evident that there are no applicable state taxes for cigarettes found in Indian country where a cigarette tax contract is in effect.

The Government clings to this Court's statement, made 16 years ago, in *Baker*, that "the interaction between the CCTA and Washington's tax scheme on which the CCTA is predicated, does not involve a complex regulatory scheme" and that is actually "quite simple." *Baker,* 63 F.3d at 1492. But that statement was made in 1995, six years before the Legislature passed the statutes which authorized the Governor to negotiate a cigarette tax contract with Indian tribes. *See* RCW 43.06.450, 43.06.455, and 43.06.460. That statement in *Baker* was made eight years before there was an existing cigarette tax contract with the Swinomish Tribe. And finally, that statement was made six or more years before the enactment of seven other statutes governing the interaction between cigarette tax contracts and Washington state cigarette taxes. RCW 82.08.0316, 82.12.0316, 82.24.020(7), 82.24.030(5), 82.24.080(4), 82.24.250(8), and 82.24.295(1). Given the enactment of these ten statutes since *Baker* was decided, to paraphrase *Baker*: "Washington's tax

scheme on which the CCTA is predicated" now *does* "involve a complex regulatory scheme" and it is no longer "quite simple."

The Government claims that cases about construing ambiguous tax statutes in favor of taxpayers only apply when the incidence of the tax falls upon the criminal defendant. This is untrue, as *United States v. Dahlstrom*, 713 F.2d 1423 (1983) demonstrates, since the tax in that case was not to be paid by the defendant. The Government makes no reply to the observation that ambiguous statutes concerning Indians are to be construed in favor of Indians, and thus makes no effort to distinguish cases such as *Quinault Indian Nation v. Grays Harbor County*, 310 F.3d 645, 647 (9th Cir. 2002), where even though no criminal liability was at issue, this Court construed the statute in favor of Indians because in the "netherworld of Indian taxation, the ambiguity inherent in this tax scheme" tipped the balance in favor of the Tribe.

4. UPHOLDING THE WILBURS' CONVICTIONS WOULD VIOLATE THE DUE PROCESS CLAUSE.

The Supreme Court has consistently held that criminal tax offenses are not covered by the normal common law presumption that every man knows the law:

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, this Court almost sixty years ago interpreted the statutory

> term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

United States v. Cheek, 498 U.S. 192, 199-200 (1991).

The Wilburs rely on a line of cases which hold that when there is a lack of clarity in the tax law, a criminal prosecution for failure to comply with a tax law is constitutionally impermissible. Such prosecution is permissible only when it is "clear beyond any doubt that [the conduct] is illegal under established principles of tax law . . ." *United States v. Russell*, 804 F.2d 571, 575 (9th Cir,. 1986). The Government contends that cases like *Russell* are inapplicable and notes that "the indictment does not charge a criminal tax offense, so the Wilburs' reliance on this line of authority is misplaced." *Brief of Appellee,* at 47. But the Government fails to explain why the indictment "does not charge a criminal tax offense." Surely the indictment charged a criminal offense – conspiracy to violate the CCTA -- and surely that offense involves tax money? The Government claim over $10 million in tax money should have been paid to the State of Washington. Restitution has been ordered for this unpaid and allegedly owed state tax. So why isn't this a criminal tax offense case?

The Government maintains that trafficking in contraband cigarettes is merely a general intent crime and that ignorance of the law is no defense. *Id.* But 18 U.S.C. § 2342(a) explicitly requires proof that the defendant "knowingly" possessed, sold,

or distributed contraband cigarettes. Normally the word 'knowingly' modifies everything that comes after it." *See, e.g., United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994).

In *Baker* this Court explicitly held that since the CCTA requires proof of "knowingly" possessing contraband cigarettes, "[t]his provision of the statute requires willfulness." 63 F.3d at 1492. The Supreme Court has consistently held, in criminal tax cases such as *United States v. Pomponio*, 429 U.S. 10, 23 (1976), that when proof of willfulness is required, it must be shown that the defendant's failure to collect or to pay a tax was "a voluntary, intentional violation of a *known legal duty*." (Italics added). Therefore, proof of the willfulness element of a CCTA offense requires proof that the defendant intentionally failed to pay a cigarette tax in violation of a "known" legal duty to pay it.

In this case there was no precedent regarding the interaction of those statutes governing cigarette tax contracts with an Indian tribe and the statutes which imposed a duty to collect state cigarette taxes. It certainly was not clear beyond doubt that the Wilburs had to pay such State taxes. Therefore, under cases such as *Russell, United States v. Dahlstrom,* 713 F.2d 1423 (9th Cir. 1983), and *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985), it would violate due process to allow the Wilburs' convictions to stand.

C. CONCLUSION

For these reasons stated above, Marvin Wilbur, Sr. asks this Court to reverse his conviction and to order the charge against him dismissed.

DATED this 21st day of March, 2011.

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