FROM: http://adask.wordpress.com/2012/08/19/affirmative-defense-confession/#more-16092:

Affirmative Defense = Confession

Dick Simkanin

"Sem" is one of the people who comment regularly on this blog.

Today, he posted a comment that read in part,

"One "poster" in particular knows from experience that when a person enters the courtroom half-cocked, that person will experience the real meaning of the double edged sword.

"First of all a plaintiff must respond to Affirmative Defenses. Secondly, the only acceptable way to do so is with Opposing Points and Authorities. Thirdly, it is the very points of Law (precedence) that is being argued:

"For instance:

"McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), was an early substantive ruling by the United States Supreme Court regarding the burdens and nature of proof in proving a Title VII case and the order in which plaintiffs and defendants present proof. It was the seminal case in the McDonnell Douglas burden-shifting framework. (Read closely…BURDEN-SHIFTING FRAMEWORK)."

I'm not sure that I clearly understood Sem's comment. Initially, I thought he was advocating "affirmative defenses". In retrospect, I suspect he wasn't advocating so much as attempting to explain something about the burden-shifting nature of "affirmative defenses".

Whatever his intended meaning, I started to pen a brief comment in response. But my comment

grew so large, that I decided to post it as the following article:

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• I would never make an "affirmative defense".

I learned the meaning of an affirmative defense about ten years ago by reading the transcripts of the Dick Simkanin pre-trial hearings. Dick was a good man who had a business (Arrow Plastics) with about two dozen employees. He intentionally stopped collecting withholding taxes from his

employees and sending those withholding to the government. He advertised his intent to challenge the government's withholding laws in full-page ads the New York Times and USA Today.

I'd met Dick a number of times. He was intelligent and hard-working. I admired his courage and integrity. He didn't enter into his conflict with the feds for the purpose of making a fast buck or robbing the government. He was motivated by a sincere commitment to do that which he believed was right.

But he didn't understand that withholding is the key to income tax collection. He thought challenging withholding laws was merely a small annoyance to the IRS. He didn't understand that if any threat to withholding was allowed to succeed, the whole income tax system would collapse. Dick didn't understand that his challenge was so serious that the government had no choice but to stop him any way it could.

The government responded by attempting to indict Simkanin for criminal offenses at a federal grand jury. Dick—without an attorney—persuaded the grand jury to not indict. All by itself, that was a brilliant achievment. How many pro se's have you heard of who could stop a federal prosecutor from securing an indictment from a federal grand jury?

But the gov-co came back with a second, and then a third attempt to indict. Simkanin stopped both attempts. Again, his achievements were almost astonishing.

But Dick began to realize that the feds would never stop coming after him, and he lost his self-confidence and hired an attorney. That was probably a fatal mistake.

The feds returned to the grand jury a fourth time, and this time, defended by his attorney, Simkanin was indicted.

• At one of the following pre-trial hearings, Dick's attorney informed federal judge McBride that he'd be making an "affirmative defense" by arguing that Dick's failure to collect taxes on behalf of the government wasn't "willful". Judge McBride was clearly shocked and at a loss for words. He stammered, "Well, uhhh, that means you won't be able to introduce all of your evidence." (This was the evidence that the government's withholding laws were unconstitutional or otherwise defective. This was the evidence that Simkanin had used to single-handedly stop three

federal indictment proceedings. This was strong evidence.)

Then judge McBride asked the prosecutor for his opinion. The prosecutor also stammered, “Well, they won’t be able to introduce all of their evidence.” Two or three minutes later, McBride again

warned Simkanin’s attorney that if he made an affirmative defense, he wouldn’t be able to introduce all of his evidence.

Simkanin’s attorney (and probably Simikanin who was presumably present at the hearing, but said nothing on the transcript) ignored the Judge’s two warnings and the prosecutor’s one warning and merrily proceeded to rely on an affirmative defense. It was as if they were deaf. They were expressly warned three times that if they made an affirmative defense, they wouldn’t be able to introduce all of their evidence.

But neither Simkanin nor his attorney apparently heard or understood the warnings. They were probably so single-mindedly obsessed with making an affirmative defense that they couldn’t imagine any warning would be valid. My recollection of that transcript is unnerving. Simkanin’s failure to heed those warnings sealed his doom.

Simikanin was subsequently tried. His affirmative defense was that his failure to collect withholding taxes wasn’t “willful”. Observers thought Judge McBride railroaded Simkanin because he prevented Simkanin from entering all of his evidence. But, in fact, Simkanin was tried fairly because he had entered an “affirmative defense” and therefore—exactly as Judge McBride had warned—he was not allowed to enter all of his evidence.

• Why? Because an “affirmative defense” is first and foremost, a confession.

To illustrate, consider the classic “affirmative defense”: the insanity plea.

Suppose you murdered someone and there were no witnesses, no cameras, no evidence of your guilt. If you’re suspected, you can plead not guilty, refuse to testify, and simply rely on the cops’ lack of evidence and inability to prove your guilt.

But suppose you murdered someone in front of six witnesses, and two surveillance cameras. They got you cold. There’s so much evidence against you, that you can’t very well deny that you

committed the murder.

However, the section of your state's penal code that concerns murder will probably include a subsection that says something like "It is an affirmative defense that the defendant was insane at the time he committed the murder."

If so, you make an "affirmative defense" of claiming you were crazy when you killed that guy.

But note this very important point: Before you can claim you were crazy, you must first admit that you did, in fact, murder the victim.

There's no point to claiming you were crazy when the victim was killed unless you were the killer. If you're not the killer, whether you were crazy or not when the guy died is irrelevant.

Thus, your affirmative defense is first and foremost a confession.

By making an affirmative defense, you are confessing that Yes, you killed him—but—you were barking mad when you pulled the trigger and therefore you can't be held accountable for the man's death.

• Willful failure to file income taxes implicates another affirmative defense. The defendant claims that his failure to file wasn't "willful" and bets that the government can't prove it was willful. After all, who can prove what your intentions were at any given time? If you testify that your failure to file was not "willful," who could possibly testify that your failure to file was "willful"? No one else can certainly know what's going in your mind at any particular moment, so no one could refute your testimony that your omission wasn't "willful".

Thus, we are faced with a very good question: Who–including YOU–can PROVE your intentions at any given time?

• Most people don't understand that an affirmative defense is a confession. Once you make an affirmative defense, the prosecutor has made his case—he has nothing left to prove. Once you make an affirmative defense, you have largely waived your presumption of innocence.

The gov-co charged you with murder, and you've confessed. The prosecutor met his burden of proof based on your confession. By virtue of your affirmative defense, you're guilty—unless you

can prove that you were crazy when you killed that guy or “not willful” when you didn’t file your 1040.

Likewise, any evidence that you might’ve wanted to admit to show that you didn’t kill the victim, or that you did file the appropriate paperwork, or that there’s no law requiring you to collect withholding from your employees is no longer relevant or admissible (just as Judge McBride warned Simkanin’s attorney). Why should the court admit evidence to prove you didn’t murder the guy after you’ve already confessed? Why waste the jury’s time listening to such defenses after you’ve confessed?

Once you make an affirmative defense, you have confessed but with a proviso: you killed the guy, but you were “crazy” when you pulled the trigger, see? You admittedly didn’t file your income tax returns, but your failure to do so wasn’t “willful,” see? With a successful affirmative defense, you can commit a crime and still get away with it.

• Most people who try affirmative defenses don’t understand the implications of their confession and the fact that the prosecutor’s burden of proof has been met. The prosecutor has nothing left to prove. So, when you claim that you were crazy when you shot that guy, or that you didn’t act willfully when you failed to file, there’s no burden of proof on the prosecutor to prove that you were not crazy or to prove that you did willfully failure to file. Once you make the affirmative defense, the burden of proof shifts from the prosecutor to the defendant to prove that he was crazy when he pulled the trigger or to prove that he did not “willfully” fail to file his 1040. Affirmative defenses are a trap.

• Almost no one understands that when you make an affirmative defense, because you’ve confessed, the only evidence that’s admissible goes to your mental state. No other crap about “where’s the law that makes me liable?” is admissible. Your confession obviates all such evidence as irrelevant. The only remaining issue is your mental state at the time of the offense to which you’ve already confessed.

More, almost no one understands that when you make an affirmative defense (because you’ve

confessed and there is no longer a burden of proof on the prosecution), that the only remaining burden of proof has shifted to the defendant. It's not up to the prosecutor to prove that you weren't crazy when you killed that guy. It's up to the defendant to prove that he was crazy. It's not up to the prosecutor to prove that your failure to file income tax was "willful," it's up to you to prove that your confessed failure to file was not "willful".

Bear in mind that we're talking about proof—not just allegations. You must prove according to rules of evidence that you were crazy. Your mere allegations that you were crazy will not generally be believed.

So, if you were confronted with a need to prove (not merely allege) that you were crazy last February 14th, could you provide enough evidence to prove that you were insane? Could you summons a half dozen disinterested witnesses who could testify that you were merely angry, or cold-blooded, but that you were stark, raving mad? How would you find enough witnesses able to testify to what your internal mental state really was last Valentine's Day?

You might recall what your mental state was last Tuesday, or last Christmas or the last time you were married. But do you think you could prove your mental state to satisfaction of a jury? I do not.

As I said, an affirmative defense is usually a trap to entice the unwitting into making a confession. Once you've confessed, your chances of somehow voiding your own confession are extremely remote.

• Which brings me back to my earlier question: Who–including YOU–can PROVE your intentions (mental state) at any given time?

Under unusual circumstances, you might be able to prove you were crazy when you pulled the trigger, or that you did not act "willfully" when you failed to file. But in about 99% of all affirmative defenses, defendants don't even realize they've confessed or that the burden of proof is on them to prove their mental state. In those rare instances when the defendant or his attorney understands the burden is on the defense to prove their "affirmative defense," it's still extremely rare that they can provide enough admissible evidence to prove to a jury that the defendant was

really “crazy” or “not willful”.

• Dick Simkanin was sincere, knowledgeable and patriotic. Without an attorney, he stopped the government’s prosecution against him in three successive federal grand juries. When the feds came back a fourth time, he lost his nerve and hired a lawyer. His idiot lawyer made an affirmative

defense, Simkanin unwittingly confessed and was prevented from introducing his evidence about the validity of the income tax laws he was charged under, and was convicted.

Neither Dick nor his attorney (who was reportedly paid over $50,000) understood the nature of an affirmative defense, let alone, that it was their burden to prove Simkanin did not act willfully. Dick was convicted and sentenced to 9 or 10 years. He got out about 18 months ago. Some genius told him he didn’t have to show up at his parole hearings. Dick agreed. He was out less than a month before the feds grabbed him for parole violations and threw him back into the slammer where he died within a year or so.

Simkanin’s story is tragic. He heroically stood up to the government. He didn’t sneak around. He publicly broadcast his ideas and opinions. And now, because he hired an attorney and neither he nor his attorney understood the concept of an “affirmative defense”—he’s dead as a door nail.

• Irwin Schiff is an intelligent man who fought the IRS for years. He wrote a couple of books on income tax laws. He was jailed at least once or twice for “tax resistance” before A.D. 2000 when he was charged again with one or more counts of violating income tax laws.

As I understand it, Irwin made an affirmative defense whereby he denied committing any of the alleged offenses “willfully”. He reportedly drafted an affidavit of denials and then entered the

affidavit into the court record. He apparently thought that once he denied under oath that he had acted “willfully,” the burden of proof would be on the prosecutor to prove that he had acted “willfully”.

Therefore, after Irwin introduced his affidavit of denial, he sat down and refused to testify further. After all, if he wouldn’t testify, how could the prosecutor possibly prove he had acted “willfully”?

That strategy would make perfect sense, except that, once Irwin made an affirmative defense: 1) he confessed; and 2) the burden of proving whether Irwin had or had not acted "willfully" shifted from the prosecutor to the defendant.

So when Irwin sat down and refused to testify further, he absolutely failed to meet his burden of proof. I'll bet it was all the judge could do to keep from laughing.

Result? Affirmative defense = confession = conviction. So far as I know, Irwin is still in the slammer and given that he's in his 70s, there's a high probability that he may die there.

Why? Because he made an affirmative defense–but didn't have a clue to what that meant.

It's possible that to this day, Irwin might not realize that the reason he's in a federal penitentiary is that he: 1) unwittingly confessed to the charges against him; and 2) refused to even try to meet his burden of proving that he did not act willfully.

I've met Irwin. He's a good man. He's also a character. It's a shame he's in the slammer. But as the Old Testament warns, "my people perish for lack of knowledge". Dick Simkanin and Irwin

Schiff attempted to defend against federal prosecutions with "affirmative defenses". However, because neither Schiff, Simkanin or Simkanin's attorney really understood the "affirmative defense," Simkanin has already perished in prison, and Schiff just might.