

# In the United States Court of Federal Claims

No. 09-868C  
(Filed: January 21, 2010)

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JEROME ALLAMBY, \*  
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 Plaintiff, \*  
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 v. \*  
 \*  
 THE UNITED STATES, \*  
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 Defendant. \*  
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## OPINION AND ORDER

Plaintiff filed a pro se complaint in this court on December 16, 2009, seeking damages for his purported unjust conviction for income tax evasion. Although defendant has not yet entered an appearance in this case, there is no need to await its response. Because plaintiff has unquestionably failed to allege the necessary factual predicate to support his claim for unjust conviction, the court must dismiss his complaint for lack of jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”).

### **I. BACKGROUND**

Plaintiff was indicted on February 27, 1997, for, among other things, income tax evasion in violation of 26 U.S.C. § 7201.<sup>1</sup> Compl. 3. He was arrested in his home on April 10, 1997, and subsequently released on bond. Id. at 3-4. Plaintiff’s case was tried to a jury in the United States District Court for the Eastern District of New York from August 13, 1997, through August 18, 1997. Id. at 3, 5, 7. On August 19, 1997, the presiding judge charged the jury, which, after deliberations, returned a guilty verdict. Id. at 7, 13. Plaintiff was thereafter sentenced, on March

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<sup>1</sup> Section 7201 provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7201 (1994).

27, 1997, to a term of imprisonment of twelve months and one day, to be followed by three years of supervised release. Id. at 13. Plaintiff was released from prison on March 21, 1999, and his probation ended in 2002. Id. at 13-14. Seven years later, plaintiff filed the instant complaint seeking thirty million dollars in compensatory and punitive damages for unjust conviction. In support of his contention that his conviction was unjust, he argues, in general, that the United States violated various rules of criminal procedure relating to his indictment, arrest, and trial; that the Internal Revenue Service lacks the authority to collect the federal income tax; that the Internal Revenue Code is unconstitutional; and that the federal income tax constitutes an enslavement of individuals in violation of the Thirteenth Amendment of the United States Constitution. Id. at 3-14.

## II. STANDARD OF REVIEW

### A. Subject Matter Jurisdiction

Whether the court has jurisdiction to decide the merits of a case is a threshold matter. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). The parties or the court sua sponte may challenge the court’s subject matter jurisdiction at any time. Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

The ability of the United States Court of Federal Claims (“Court of Federal Claims”) to entertain suits against the United States is limited. “The United States, as sovereign, is immune from suit save as it consents to be sued.” United States v. Sherwood, 312 U.S. 584, 586 (1941). The waiver of immunity “cannot be implied but must be unequivocally expressed.” United States v. King, 395 U.S. 1, 4 (1969).

### B. RCFC 12(b)(1)

In deciding whether to dismiss a complaint for lack of jurisdiction, the court assumes that the allegations in the complaint are true and construes those allegations in plaintiff’s favor. Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995). However, plaintiff bears the burden of proving, by a preponderance of the evidence, that the court possesses subject matter jurisdiction. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). The court may look to evidence outside of the pleadings to determine the existence of subject matter jurisdiction. Land v. Dollar, 330 U.S. 731, 735 & n.4 (1974); Reynolds, 846 F.2d at 747. If the court concludes that it lacks subject matter jurisdiction over a claim, RCFC 12(h)(3) requires the court to dismiss that claim.

### III. DISCUSSION

Pursuant to 28 U.S.C. § 1495, the Court of Federal Claims “shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.” Thus, a key element of the statute is that a conviction be “unjust.” The requirements of section 1495 are amplified by 28 U.S.C. § 2513, which provides that “[a]ny person suing under section 1495 of this title must allege and prove that”:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

28 U.S.C. § 2513(a) (2006); see also Grayson v. United States, 141 Ct. Cl. 866, 869 (1958) (per curiam) (holding that “these two sections must be read together, since one refers to the other”). “When they are read together it becomes manifest that the sections confer jurisdiction on this court only in cases where there has been conviction and in which the other conditions set out in section 2513 are complied with.” Id. Thus, to invoke the statute and obtain an award of damages, plaintiff must demonstrate that his conviction has already been reversed or set aside, that he was found not guilty after a new trial or rehearing, or that he was pardoned on innocence grounds. Plaintiff, however, has made no such allegations in his complaint. Nor can he make such a showing—his conviction was upheld on appeal.<sup>2</sup> See United States v. Allamby, 165 F.3d

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<sup>2</sup> To the extent that plaintiff is using the instant complaint as a vehicle to collaterally attack his conviction, his attempt fails. See Carter v. United States, 228 Ct. Cl. 898, 900 (1981) (per curiam) (“If plaintiff had valid constitutional defenses to his convictions on criminal charges, he should have asserted them on appeal in the proper court. This is not such a court and he cannot here be heard to make a collateral attack on his convictions under the guise of a claim for money damages.”); see also Joshua v. United States, 17 F.3d 378, 379-80 (Fed. Cir. 1994) (affirming that it had “no jurisdiction to adjudicate any claims whatsoever under the federal criminal code” and holding that “the Court of Federal Claims does not have jurisdiction to review the decisions of district courts or the clerks of district courts relating to proceedings before those courts”); Kania v. United States, 650 F.2d 264, 268 (Ct. Cl. 1981) (noting that “the role of the judiciary in the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to this court”); Schweitzer v. United States, 82 Fed. Cl. 592, 596 (2008) (holding that the Court of Federal Claims lacks jurisdiction over challenges to “indictments, arrests, prosecutions, convictions, imprisonment, or parole”).

15 (2d Cir. 1998) (unpublished table decision), cert. denied, 526 U.S. 1124 (1999); see also Allamby v. United States, 207 Fed. App'x 7, 8-9 (2d Cir. 2006) (summary order) (affirming the district court's dismissal of plaintiff's complaint to vacate the purported unjust conviction); Allamby v. United States, 85 Fed. App'x 784, 785-86 (2d Cir. 2004) (summary order) (affirming the district court's dismissal of a separate complaint filed by plaintiff to vacate the purported unjust conviction); United States v. Allamby, 205 F.3d 1325 (2d Cir. 2000) (unpublished table decision) (affirming the district court's denial of plaintiff's motions for a judgment of acquittal and a new trial). Because plaintiff cannot satisfy a critical statutory requirement—that he was wrongfully convicted due to his innocence on all charges—this court lacks the jurisdiction to grant the relief he requests.<sup>3</sup>

#### IV. CONCLUSION

With the instant complaint, plaintiff continues his eleven-year quest to overturn his conviction. See Allamby v. United States, No. 05-CV-6052 (ARR), 2006 WL 1390577, at \*1 (E.D.N.Y. 2006) (describing plaintiff's numerous challenges to his conviction), aff'd, 207 Fed. App'x at 7 (noting that plaintiff's action against the United States was “the latest in a series of unsuccessful suits filed by Allamby to challenge his 1998 conviction for tax evasion and fraud”). Plaintiff initiated all of his prior challenges in the United States District Court for the Eastern District of New York. Lacking success in that court, he has brought the instant suit in a new forum—the Court of Federal Claims.

In addressing plaintiff's most recent suit in the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second Circuit warned plaintiff that he would be “subject to sanctions if he continue[d] to abuse the judicial process by instigating further frivolous tax challenges” and, “[t]o ensure against such abuse,” ordered plaintiff to attach a copy of its summary order “to any future filing relating to taxation.” Allamby, 207 Fed. App'x at 9. Although plaintiff did not attach the summary order to the instant complaint, as mandated, the court will not direct an award of sanctions against him. However, the court warns plaintiff that future abuse of the judicial process in the Court of Federal Claims may result in such sanctions.

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<sup>3</sup> Plaintiff also characterizes his “unjust indictment, conviction and imprisonment” as a “tort” and a “Constitutional Tort felony of a fraudulent nature . . . .” Compl. 3. However, the Court of Federal Claims does not possess jurisdiction to entertain claims sounding in tort. See 28 U.S.C. § 1491(a)(1) (2006) (excluding claims sounding in tort from the jurisdiction of the Court of Federal Claims); see also Alves v. United States, 133 F.3d 1454, 1459 (Fed. Cir. 1998) (“To the extent that . . . allegations sound in tort, the Court of Federal Claims lacks jurisdiction under the Tucker Act . . . .”).

For the reasons set forth above, the court **DISMISSES** plaintiff's complaint for lack of jurisdiction pursuant to RCFC 12(b)(1). No costs. The clerk is directed to enter judgment accordingly.

**IT IS SO ORDERED.**

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MARGARET M. SWEENEY  
Judge