IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA STATESVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**DOCKET NO. 5:09CR27-V**
	)	
BERNARD VON NOTHAUS, *et al.*,	)	
	)	
Defendants.	)	
	)	
_____	)	

REPLY BRIEF OF AMICUS CURIAE GOLD ANTI-TRUST ACTION COMMITTEE, INC.

Of Counsel
Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
William J. Olson, P.C.
370 Maple Ave., W. Ste. 4
Vienna, VA 22180-5615
Telephone: (703) 356-5070
Fax: (703) 356-5085
Email: wjo@mindspring.com

Of Counsel
Gary G. Kreep
United States Justice Foundation
932 D St., Suite 2
Ramona, CA 92065-2355
Telephone: (760) 788-6624
Fax: (760) 788-6414
Email: usjf@usjf.net

Thomas J. Ashcraft
Attorney at Law
Counsel for Amicus Curiae
610 E. Morehead St., Suite 104
Charlotte, NC 28202-2614
Telephone: (704) 333-2300
Fax: (704) 377-1226
Email: tashcraft@bellsouth.net

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I. The Government's Post-Trial Press Release Is Relevant to this Case.

In its opposition brief, five times the Government urges this Court to "disregard" Gold Anti-Trust Action Committee, Inc.'s ("GATA's") *amicus* brief. *See* United States' Response in Opposition to Brief of *Amicus Curiae* ("U.S. Resp."), pp. 1, 4, 5, 16, and 17. According to the ordinary definition of "disregard," the Government's position is not that *amicus'* arguments are just wrong on the law, but that they are "unworthy of regard or notice," to which this Court should give "no thought" or "pay any attention."[1] Further, the Government attacks the supposed "procedural impropriety of the pleading,"[2] even though the brief was filed pursuant to the Court's order granting *amicus'* motion for leave. Finally, the Government charges *amicus* with "pursu[ing] its lobbying interests," when, in fact, the contents and thrust of the *amicus* brief concern legal matters proper for judicial resolution, not "political" ones calling for legislative action.[3]

Instead of urging this Court to disregard the *amicus*, the Government should welcome this opportunity to test whether the von NotHaus conviction rests upon a solid constitutional foundation, or on the unconstitutional quicksand of presumed power. As Supreme Court Justice George Sutherland, observed:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. [Berger v. United States, 295 U.S. 78, 88 (1935).]

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[1] Webster's Third New International Dictionary, p. 655 (1964).

[2] *See* U.S. Resp., p. 16.

[3] *Id.*

In an effort to deflect attention away from the legal issues raised in the *amicus* brief, the Government also urges this Court to disregard the "government's post-trial press release," wherein the U.S. Attorney characterized Mr. von NotHaus's actions as "domestic terrorism" and threatened "infiltration, disruption, and dismantling of organizations which seek to challenge the legitimacy of our democratic way of life" — as if her out-of-courtroom statements are not "relevant to any issue before the court at this time." *See* U.S. Resp., p. 3. Attorney General Robert H. Jackson[4] would not have thought such pronouncements unworthy of this Court's attention. Speaking to an assembly of U.S. Attorneys a few months after his appointment as the nation's chief law officer, Jackson observed:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens **investigated** and, if he is that kind of person, he can have this done to the tune of **public statements** and veiled or unveiled intimations. [R. Jackson, "The Federal Prosecutor" (Apr. 1, 1940) (emphasis added).[5]]

"Because of this immense power to strike at citizens … with all the force of government itself," Mr. Jackson counseled his fellow prosecutors that "[a]lthough the government [may] technically lose[] its case, it has really won if justice has been done." *Id.*

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[4] No stranger to the prosecutorial power of government and the temptations to misuse that power, Mr. Jackson served as counsel to the predecessor to the I.R.S., Assistant Attorney General, Solicitor General, and Attorney General before his appointment to the U.S. Supreme Court, where he served as an Associate Justice from 1941 to 1954, and, while in such service, he was the chief U.S. prosecutor at the Nuremberg trials.

[5] http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson.

II. The "Constitutional Argument" Made by *Amicus Curiae* Is Not Being Advanced for the First Time.

In its response, the Government seeks to avoid review of the *amicus* brief on the merits, representing to the Court that its "constitutional argument" is being "advanced for the first time in these proceedings." U.S. Resp., p. 2. This is demonstrably false. The Government first introduced the constitutional issue (addressed by *amicus*) in paragraphs 33 and 34 of the indictment, claiming that Article I, Section 8, Clause 5, impliedly authorized Congress to enact laws to prohibit "private coin systems [from] compet[ing] with the official coinage of the United States." Then, in his pre-trial motion to dismiss the indictment, Defendant von NotHaus challenged that assertion on precisely the same theory as this *amicus* — contending that "the Constitution places restrictions only on State and on the Federal Government, not on individuals, so any 'monopoly' given to the Federal government would be simply a prohibition on the powers of the State, not of individuals." *Compare* Motion to Dismiss Challenging the Sufficiency of the Indictment to State an Offense ("Motion to Dismiss"), pp. 8-9 *with Amicus* Brief, pp. 20-22.

The Defendant's pre-trial argument was not cursory. Rather, he proffered a textually specific refutation of the Government's position that the grant of power to "coin money" should be construed to confer upon itself a money "monopoly," by analogizing it to a claim that the grant of power to establish a post office should be construed to empower Congress to outlaw Federal Express. *Id.,* p. 9. And, exactly as this *amicus* has argued, Defendant von NotHaus contended that the only authority conferred upon Congress in relation to private money is the one found in Article I, Section 8, Clause 6 — to punish counterfeiting. *See id.,*

pp. 4-9. In its response to Defendant's pre-trial motion, the Government made no effort to meet either of these challenges. Instead, the Government completely ignored Defendant's enumerated power challenge.

So it is not that the *amicus* has raised this constitutional issue for the first time, but it is the first time that the Government has made any effort whatsoever to defend the constitutionality of its interpretation and application of Section 486 in this case. On that point, *amicus* has not interjected a new argument, but has added depth to an earlier analysis offered by Mr. von NotHaus. In reality, *amicus* is urging this Court to reconsider Defendant's Motion to Dismiss, having marshaled additional support for Defendant's constitutional claims. Reconsideration would be appropriate in light of the significance of the issue and the fact that the Government had previously failed to brief the issue. Earlier this month, U.S. District Court Judge James C. Cacheris initiated his own reconsideration of his earlier order and opinion in a federal election criminal prosecution, "[k]eeping in mind that 'this Court owes no deference to itself,' and can correct its own opinions." *See* United States v. Danielczyk, Case No. 1:11cr85, Order, p. 1 (U.S. District Court for the Eastern District of Virginia: June 7, 2011) (footnote omitted).[6]

III. The Government Is Mistaken in Its Assumption that Counterfeiting Requires Only Proof that a Coin Is "in Resemblance or Similitude" to an Official U.S. Coin.

The Government asserts that its "theory of the case — as demonstrated by the indictment, the evidence presented to the jury, and closing argument — was that the Liberty Dollar coins at issue in this case **resembled** coins of the United States." U.S. Resp., p. 5

[6] http://www.politico.com/static/PPM170_cacherisupholds.html.

(emphasis added). On this basis alone, the Government maintains that it made out a *prima facie* case sufficient to support a jury verdict of counterfeiting under both Sections 485 and 486. *Id.* Under the Government's theory of the "counterfeit," it is enough that there was evidence that the Liberty Dollar was intended to compete as money with the official currency, thereby supposedly "undermining the U.S. monetary system." *See* U.S. Resp., pp. 10-12. By prosecuting Mr. von NotHaus on this counterfeit theory, the Government fused the two different offenses defined in Sections 485 and 486 into one, allowing the Government to secure convictions on both substantive offenses as well as conspiracy. This perverse result is not a matter of "speculation," as the Government has argued, but is a fact established by the Government's own appraisal of the sufficiency of its evidence to convict on all three counts:

> To ignore the overwhelming evidence regarding the common and **similar** features of the Liberty Dollar coins when compared to U.S. coinage, the defendant's words and deeds in relation to the distribution of the Liberty Dollar coins, the literature and marketing materials related to the creation, use and distribution of the Liberty Dollar coins, and the clear ability of the jury to visually compare the Liberty Dollar coins to U.S. coinage and make a determination of the **resemblance** and **similarities** between the two, would be contrary to well-settled law. [U.S. Resp., pp. 13-14 (emphasis added).]

But the Government has cited no case in support of this contention — and for good reason. As *amicus* has pointed out, mere "resemblance or similitude" to the official currency is **not** the settled law of counterfeiting. *See Amicus* Brief, pp. 22-25. As the U.S. District Court for the Northern District of New York ruled in 1878, the mere resemblance of a coin to an official U.S. coin, as stated in section 486, is "foreign to the law of counterfeiting." United States v. Bogart, 24 Fed. Cas. 1185 (N.D.N.Y. 1878). According to Bogart, to qualify as a counterfeit coin, the coin must not only be "in resemblance or similitude" of an official coin,

but deceitfully so. *Id.* Thus, the Bogart court asserted that the resemblance or similitude of the coinages **without** evidence that "the resemblance of the spurious to the genuine [is] such as that it might **deceive a person** using ordinary caution" completely departs from well-settled counterfeit law. *See* Bogart, 24 Fed. Cas. at 1185 (emphasis added). And that is the settled law of counterfeiting in this Circuit. *See* United States v. Ross, 844 F.2d 187, 190 (4th Cir. 1988) ("An item is 'counterfeit' if it bears such a likeness or a resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.").

Therefore, it is not enough that the Government introduced evidence that "overwhelmingly demonstrated that the Liberty Dollar **resembled** U.S. Coins." *See* U.S. Resp., p. 5 (emphasis added). Only by applying Section 486 literally — unconstrained by constitutional limitations — requiring mere similitude without evidence of deceit — was the Government able to secure a conviction on any count in this case.

IV. Congress Has No "Aggregate Powers" to Outlaw Private Coinage of Money, but Only the Enumerated Power to Punish Counterfeiting.

Not once in its constitutional analysis of Section 486 does the Government address the enumerated power to punish counterfeiting. Not once does the Government pay any attention to the Bogart opinion that Section 486, literally interpreted, is "foreign" to the law of counterfeiting. Not once does the Government address the claim that the Article I, Section 10 ban on the exercise of certain monetary powers by the States stands in opposition to the Government's argument that the mere grant to Congress of the power to coin money implies

that Congress' power is exclusive. Rather than address these matters, the Government urges this Court to waltz pass the constitutional text of enumerated powers, and blindly embrace the nontextual proposition that "[i]t is well established that the aggregate powers granted to Congress by the Constitution include broad and comprehensive authority over revenue, finance, and currency" (U.S. Resp., pp. 6-7; *see also* p. 12), and, therefore, Congress has the power to protect the official U.S. currency from competition from the Liberty Dollar. *See id.*, p. 12.

But the Constitution's enumerated congressional powers are not to be lumped together, generalized from, and then applied to resolve a question of specific legislative authority. As Joseph Story wrote in his seminal work on the United States Constitution:

> The Constitution was, from its every origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. [1 J. Story, Commentaries on the Constitution § 909 (5th ed. 1891).]

Hence, Article I, Section 1 reads: "All legislative powers **herein granted** shall be vested in a Congress of the United States…." As Chief Justice Marshall wrote in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803): "The powers of the legislature are **defined**, and **limited**; and that those limits may not be mistaken, or forgotten, the constitution is written." *Id.*, 5 U.S. at 176 (emphasis added). And, as the Supreme Court reiterated even yesterday, our written Constitution keeps government within its stated limits to "protect[] the liberty of all persons within a State by ensuring that laws enacted in excess of **delegated power** cannot direct or control their actions." Bond v. United States, No. 09-1227, slip op. pp. 9-10 (U.S. Supreme Court, June 16, 2011) (emphasis added). In short, the U.S. government is not a government

of plenary power, and it will not do for the Government to argue, as it has, that Congress may prohibit a privately issued competitive coin because of some supposed "broad and comprehensive authority over matters of revenue, finance, and currency." *See* U.S. Resp., p. 12.

Nor is it permissible under the Constitution for the Government to have completely ignored the document's express grant of power to Congress to "provide for the punishment of counterfeiting [the] current Coin of the United States," and its express limitation on state power over the nation's monetary system. But it has done just that, choosing instead to bury its analysis in extensive quotes from two court opinions — Norman v. B&O R. Co., 294 U.S. 240 (1935),[7] and United States v. Marigold, 50 U.S. (9 How) 560 (1850). *See* U.S. Resp., pp. 7-8, 12. On close analysis, neither case supports the position of the Government that Congress has the constitutional authority to prohibit a privately issued and circulated coin in competition with official U.S. currency.

Norman does not even involve counterfeiting. Rather, it addressed the question whether Congress has the power to "make Treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted…." Norman, 294 U.S. at 302. Thus, the Court completely omitted the counterfeiting clause from its catalogue of enumerated powers concerning congressional "authority over the subjects of revenue, finance, and currency." *See* U.S. Resp., p. 7. The issue in Norman had nothing to do with the

[7] Coincidentally, perhaps, the Norman opinion was written by Chief Justice Charles Evans Hughes who is famous for his statement: "We are under a Constitution, but the Constitution is what the judges say it is." http://thinkexist.com/quotes/charles_evans_hughes/.

problem of spurious versus genuine legal tender. Rather, Norman was concerned with the question whether Congress had the power to make something other than metal coinage legal tender, and thereby to obligate creditors to accept something other than metal coinage in payment of debts. In short, Norman is not on point, because it does not address the question whether Congress has the power to criminalize the voluntary and consensual behavior of people who create and circulate any medium of exchange or type of money.

While Marigold did deal with counterfeiting, it addressed the question whether Congress was vested with the power to provide for the punishment of a person who "pass[ed], utter[ed], publish[ed], or s[old] a counterfeited coin," not the question whether Congress could prohibit private coinage as a medium of exchange. As *amicus* has previously pointed out, there is nothing in the broad and sweeping language quoted by the Government that can possibly be construed to support its claim that Congress has the power to create a federal money monopoly against a competing private coinage. *See Amicus* Brief, pp. 26-28.

V. Securing a Criminal Conviction on a Constitutionally Invalid Statute Is Not Harmless Error.

The Government would have this Court apply a "harmless error" analysis to this case. *See* U.S. Resp., pp. 14-16. Quoting from Neder v. United States, 527 U.S. 1, 8 (1999), the Government finds solace in the observation that "most constitutional errors can be harmless." Yet even Neder explicitly recognized "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.' [Omitting citations.] Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Id.* at 7.

Having invited this Court to apply "harmless error" analysis, the Government then urges the Court to defer to the jury for its application: "In this case, the answer to a harmless analysis inquiry of this type would reside in the verdict itself." U.S. Resp., p. 15. First, any "harmless error" analysis is by definition a matter of law for a court to apply and is not resolved in some automatic fashion by a jury's verdict. Second, and more important, "harmless error" analysis would be inappropriate in this case for the reasons previously advanced by *amicus*. *See Amicus* Brief, pp. 30-33. In short, because the Government chose to try the case largely as an illegal competition case, and the jury was affirmatively instructed that competition alone was a crime under 18 U.S.C. § 486, any other convictions relating to allegedly associated counterfeiting are tainted.

A criminal conviction for violation of an unconstitutional statute is not one that can be placed in the harmless category. As Justice Ruth Ginsburg wrote just yesterday (June 16, 2011), concurring in Bond v. United States, No. 09-1227, slip op. (U.S. June 16, 2011) http://www.supremecourt.gov/opinions/10pdf/09-1227.pdf, (with Justice Breyer joining):

> In this case, Bond argues that the statute under which she was charged … **exceeds** Congress' **enumerated powers** and **violates the Tenth Amendment**.… "An offence created by [an unconstitutional law]," the Court has held, "is **not a crime**." *Ex parte Siebold*, 100 U.S. 371, 376 (1880). "A conviction under [such a law] is **not merely erroneous**, but is **illegal** and **void**, and cannot be a legal cause of imprisonment." *Id.*, at 376-377. If a law is invalid as applied to the criminal defendant's conduct, **the defendant is entitled to go free**.…
>
> [A] court has **no "prudential" license to decline to consider** whether the statute under which the defendant has been charged lacks **constitutional application** to her conduct.…
>
> In short, a law "beyond the power of Congress," for any reason, is "**no law at all**." [*Id.*, slip op., pp. 1-2 (Ginsburg, J., concurring) (emphasis added).]

VI. The Government's Argument from Pragmatism Is Both Unprincipled and Untrue.

The Government concludes its brief with a naked assertion that allowing Americans the freedom to decide to use a private medium of exchange, or money, that would compete with "the U.S. monetary system"[8] would be against "pure common sense" potentially leading to the undermining of "the U.S. monetary system [and] the U.S. economy in general." U.S. Resp., p. 16. The scope of constitutional powers must never be resolved by utilitarian analysis based on threats of fearful consequences that will supposedly arise from this Court's faithful adherence to the "authorial intent" of the framers.[9] However, some response to the Government's argument from pragmatism is warranted.

It is no surprise that, when the government is granted a monopoly, abuses follow. Former U.S. Senator Steve Symms (R-ID), who developed a noted expertise in monetary matters while in Congress, stated the obvious when he explained:

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[8] It is interesting that the Government was required to develop the term "U.S. Monetary System" to describe the nation's paper currency, which is not issued by the U.S. Department of the Treasury. America's coinage is issued by the U.S. Department of the Treasury, but paper currency is issued by the Federal Reserve System in the form of "Federal Reserve Notes," irredeemable in nothing but other Federal Reserve Notes. The Federal Reserve System itself is not a pure agency of the federal government. *See, e.g.*, The Federal Reserve System: Purposes and Functions, 6th ed. (September 1974) (describing the nature of the Federal Reserve System as "an independent central bank [as its] decisions … do not have to be ratified by the President [and it operates] 'independent within the government….' The member banks own all of the stock of the [twelve Regional] Reserve Banks." Pp. 2-3, 19).

[9] In his classic Validity in Interpretation (Yale University Press, 1967), now retired University of Virginia Professor of Education and Humanities E.D. Hirsch, Jr. explained that "a so-called **pragmatism** prevails which holds that the meaning of a law is what the present judges say the meaning is" and finding the current practice of **substituting the reader's view for that of the author's** to be a **usurpation**, a deliberate "banish[ment] [of] the original author as the determiner of the meaning," creating thereby "our present-day … confusion" of the true meaning of a text. Pp. viii, 5 (emphasis added).

> Were Americans given a choice, were they **free to choose** the type of money they would like to use, they would choose a money that has **enduring value**, not one that has dropped over 50 percent in the last 15 years[10] as the Federal Reserve note has….
>
> [The] power of the mint is **not an exclusive or monopoly power**. **Competition in currency** was the **intention of the founding fathers**. [S. Symms' Foreword to H. Sennholz, Money and Freedom, pp. viii-ix (Center for Futures Education, 1985) (emphasis added).]

Renowned free-market and Austrian School economist Professor Hanz Sennholz explains the "pure common sense" consequences of the money monopoly that the Government here seeks to preserve without constitutional warrant:

> [O]ur trust in a **money monopoly** invites **monetary destruction** and **economic disintegration**. Money is **inflated, depreciated, and ultimately destroyed** whenever politicians and officials hold **monopolistic power** over it. [*Id.,* p. 11 (emphasis added).]

And, of course, it is the danger to the nation's economy from an unconstitutional federal money monopoly that Mr. von NotHaus courageously has sought to remedy. In examining the legacy of the federal money monopoly, can it really be assumed that the people seeking their own good by choosing their own means of exchange in a free market could do any worse than the politicians who debase the people's currency as a means to spend without taxing, and thereby perpetuate themselves in office?

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[10] This analysis, written in 1985, is even more true today, as the dollar has continued to depreciate, losing an additional 55.5 percent of its value since 1985, even using government data. *See* Bureau of Labor Statistics, showing CPI-U indices of 100.500 (January 1985) versus 225.964 (May 2011) ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. Moreover, the degree to which the CPI-U data set has been manipulated by various Administrations is explained by economist John Williams in "Government Economic Reports: Things You've Suspected but Were Afraid to Ask!" Shadow Government Statistics (Oct. 1, 2006). http://www.shadowstats.com/article/consumer_price_index.

The matter before the court is not limited to Mr. von NotHaus. It is not an obscure issue of constitutional law with no current significance. Professor Sennholtz believed that "Freedom of our currency is **the fundamental issue**; it is **the keystone of a free society**." *Id.*, at 9 (emphasis added).

CONCLUSION

For the reasons stated herein, and in its opening brief, *amicus* requests this Court to reconsider its denial of Defendant von NotHaus' motion to dismiss, and find 18 U.S.C. § 486, as applied in this prosecution, to be unconstitutional and the conviction on all three counts be set aside.

Respectfully submitted,

/s Thomas J. Ashcraft
Thomas J. Ashcraft
Attorney at Law
Counsel for Amicus Curiae
610 E. Morehead St., Suite 104
Charlotte, NC 28202-2614
Telephone: (704) 333-2300
Fax: (704) 377-1226
Email: tashcraft@bellsouth.net

Of Counsel
Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
William J. Olson, P.C.
370 Maple Ave., W. Ste. 4
Vienna, VA 22180-5615
Telephone: (703) 356-5070
Fax: (703) 356-5085
Email: wjo@mindspring.com

Of Counsel
Gary G. Kreep
United States Justice Foundation
932 D St., Suite 2
Ramona, CA 92065-2355
Telephone: (760) 788-6624
Fax: (760) 788-6414
Email: usjf@usjf.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this 17th day of June, 2011, by means of the Electronic Filing System for the Western District of North Carolina, upon the following parties:

For the Government:
Jill Westmoreland Rose
Assistant U.S. Attorney
100 Otis Street, Room 233
Asheville, NC 28801
828-271-4661
Fax: 828-271-4670
Email: jill.rose@usdoj.gov

Thomas R. Ascik
Assistant U.S. Attorney
100 Otis Street, Room 233
Asheville, NC 28801
828-259-0644
Email: thomas.ascik@usdoj.gov

Craig D. Randall
U.S. Attorneys Office
227 W. Trade St.
Charlotte, NC 28202
704/344-6222
Fax: 704/227-0197
Email: craig.randall@usdoj.gov

Benjamin Bain-Creed
U.S. Attorney's Office
227 West Trade Street
Suite 1650, Carillon Building
Charlotte, NC 28202
704-338-3123
Fax: 704-344-6629
Email: benjamin.bain-creed@usdoj.gov

For Bernard von NotHaus:
Aaron E. Michel
Attorney at Law
3736 Surry Ridge Court
Charlotte, NC 28210
704-451-8351
Email: mail@aaronmichel.com

Randolph Marshall Lee
Attorney at Law
PO Box 77005
Charlotte, NC 28271-7000
704-481-2222
Email: RandolphLeeLaw@gmail.com

For William Kevin Innes:
Claire J. Rauscher
Federal Defenders of Western North Carolina
129 W. Trade Street, Suite 300
Charlotte, NC 28202
704-374-0720
Fax: 704-374-0722
Email: Claire_Rauscher@fd.org

Erin Kimberly Taylor
Federal Defenders of Western North Carolina
129 W. Trade Street, Suite 300
Charlotte, NC 28202
704-374-0720
Fax: 704-374-0722
Email: Erin_Taylor@fd.org

For Sarah Jane Bledsoe:
Joe Von Kallist
6743-A Fairview Road
Charlotte, NC 28210
704-366-9008
Fax: 704-365-2109
Email: joevonkallist@yahoo.com

For Rachelle L. Moseley:
Matthew G. Pruden
301 E. Park Avenue
Charlotte, NC 28203
704-338-1220
Fax: 704-338-1312
Email: mpruden@tinfulton.com

This the 17th day of June, 2011.

/s Thomas J. Ashcraft
Thomas J. Ashcraft
Attorney at Law